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PREFACE

The law of money which, prior to the nineteenth century, had been a major subject of legal inquiry, seems to have regained its place in legal thought. The importance and multiplicity of the problems involved have perhaps never made themselves more strongly felt than within the last few years. The legal difficulties arising from monetary troubles are unusual, not only because of their financial and social implications, but also because of their theoretical intricacies. The arguments advanced by courts in cases of a monetary nature are often unsatisfactory. Again and again, monetary situations have been misinterpreted by courts, and confused doctrines advanced. Most legal writing touching money has been so scanty or so limited in scope as to be of little material aid to the courts in dispelling difficulties. These circumstances warrant an effort to attack the legal problems of money at their very foundations in order to find the basis for a sound and consistent body of law.

The present volume, which is the outcome of more than fifteen years' work, represents such an effort. While emphasizing American law, it aims at analyzing and determining the universal principles that underlie the law of money. Use of the comparative method is indicated for that purpose. Even the courts, contrary to their customary attitude, have in monetary cases not infrequently referred to foreign law, beginning with the famous *Mixed Money* case, decided in 1604 by the Privy Council. In this volume the view is taken that the basic monetary problems of developed economic systems are substantially the same throughout the world; and that the legal thought and experience of each country concerning these problems may therefore aid in a better understanding of monetary troubles in others. This conception led quite naturally to another aspect of the matter, namely, to a search into the attitudes of the judiciaries of the leading countries in monetary controversies; controversies which because of their social and political consequences, present tests of the compe-

tence and impartiality of the courts. In this sense the present study may be said to constitute a comparative inquiry into justice as well as into law.

The predominance of American law in the discussion is not merely attributable to the fact that the book was written in this country. American monetary history from the colonial era to the present time affords a unique wealth of important and often dramatic events and problems, mirrored in several hundred reported cases. Apart from the analytical interest which they offer, the study of their background is worthwhile in itself. Hence, a relatively large portion of the volume has been devoted to an exposition, from the legal angle, of this country's monetary history.

This is a legal study, written primarily for lawyers, practitioners as well as students. It makes no pretense to discuss the purely economic aspects of money. The legal problems involved are sufficiently important to warrant independent treatment based on methods of legal research. Nevertheless the writer believes that his study may prove to have pertinence for many questions with which economists are concerned. The legal considerations arising in connection with the study of money have certainly been neglected in English and American economic learning.

The first three chapters of the book are concerned with money as such, namely, with its general legal aspects, and particularly with the conception of the monetary unit (chapter I); with the various kinds of money (chapter II); and with the systems by which various kinds of money are coordinated on the basis of a unit (chapter III). While the sections opening the third chapter treat the subject of monetary systems in general terms, the concluding sections offer a discussion of the American system, illustrative of the viewpoints previously set forth. Chapters four to eight form the second and larger part of the volume. Devoted to an analysis of debts, *i.e.*, of monetary obligations, they contain the bulk of the cases and, generally, the material which will be of particular interest to the practicing lawyer. These chapters progress from the pure and simple debt (chapter IV), through the impact of fluctuating currencies upon debts (chapter V) to the more complicated forms of debts (chapter VI: gold debts; chapter VII:

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foreign currency debts), concluding with the recent and revolutionary transformation of debts through exchange control (chapter VIII).

Cases and materials which were available to the author up to October, 1938, have been covered; in some instances, it was possible during the process of printing to include references of later date.

It is through the hospitality of Columbia University that I have been able to continue my work which was so precipitately interrupted. I am particularly and deeply grateful to the members of the Columbia Law Faculty for their encouragement and the insight into American law and conditions which my association with them has afforded me. Their aid has been generous and of inestimable value to me. I also wish to express appreciation of the work done by the students in my seminar on the Law of Money at Columbia Law School. I have benefited greatly from their studies. The Columbia Council for Research in the Social Sciences has aided me by a substantial grant for the preparation and publication of this volume. It appears under the auspices of the Council to which I feel sincerely indebted.

I am happy to acknowledge the valuable assistance of Mr. Herman Marcuse of New York, a graduate of the Columbia Law School, in the preparation of this book. He was particularly helpful in the tracing and collecting of material so widely spread over space and time, and in the correction of the manuscript. I also wish to express my thanks to Mr. Sanford Schwartz of the New York Bar. He has read the whole manuscript and has contributed much to the improvement of this volume by giving me the benefit of his competent linguistic criticism and of his extraordinary juridical discernment and acumen.

Finally, I thank the editors of the Columbia Law Review, Michigan Law Review, University of Pennsylvania Law Review, and Yale Law Journal for permitting me to incorporate into the volume discussions previously published in these journals.

ARTHUR NUSSBAUM

New York, March, 1939.

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NOTE ON ABBREVIATIONS

For the Common Law cases (United States and British Empire jurisdictions) the conventional abbreviations have been used. They may be found, *e.g.*, in:

Beardsley, *Legal Bibliography and the Use of Law Books* (1937) Appendix X Abbreviations

Black's *Law Dictionary* (3rd ed., 1933), Table of Abbreviations

Bouvier's *Law Dictionary* sub. tit. *Abbreviations*

Hicks, *Materials and Methods of Legal Research* (2d ed., 1933)

Furthermore, the following abbreviations have been employed in this volume:

- | | |
|----------------------|--|
| 1. Bull. I.I.I. | <i>Bulletin de l'Institut Intermédiaire International</i>
(until 1933)
<i>Bulletin de l'Institut Juridique International</i>
(since 1934) |
| 2. D.H. | Dalloz, <i>Recueil Hebdomadaire de Jurisprudence</i> |
| 3. D.P. (up to 1923) | Dalloz, <i>Jurisprudence Générale, Recueil Périodique et Critique de Jurisprudence</i> |
| (since 1924) | Dalloz, <i>Recueil Périodique et Critique de Jurisprudence</i> |
| 4. J.D. Int. | <i>Journal du Droit International</i> (Clunet) |
| 5. J.W. | <i>Juristische Wochenschrift</i> |
| 6. R.D. Comm. | <i>Rivista del Diritto Commerciale</i> |
| 7. R.G.Bl. | <i>Reichsgesetzblatt</i> |
| 8. R.G.Z. | <i>Entscheidungen des Reichsgerichts in Zivilsachen</i> |
| 9. Sirey | <i>Recueil Général des Lois et des Arrêts</i> |
| 10. Z.A.I.P. | <i>Zeitschrift für Ausländisches und Internationales Privatrecht</i> |

CHAPTER I

BASIC MONETARY CONCEPTIONS IN LAW

SECTION 1

LEGAL SIGNIFICANCE AND CONCEPT OF MONEY

I. *Legal Importance of the Money Concept*

Money is a fundamental concept of the law. There are few juridical notions of greater importance. Not only are specific sums of money referred to in most legal transactions, but the abstract term "money" also appears frequently in codes, statutes, judgments, contracts, and wills. Some examples of major interest may be mentioned. The bona-fide holder of money converted, stolen, or lost is especially protected by the law.¹ Negotiable instruments must be couched in terms of money.² Counterfeiting of money is much more severely punished than other falsifications.³ Under Anglo-American law, just as under the Roman law, judgments against a defendant ordinarily must be rendered in terms of money, though the plaintiff may have contracted for a non-monetary performance, such as a conveyance, service, or omission (*Omnis condemnatio pecuniaria est*).⁴ The export and import of money are subjected to rules different from those imposed upon the export and import of commodities; while ordinary customs regulations do not apply to money, special restrictions are often laid upon its export or import.⁵

¹ *Infra*, sec. 5 I.

² *Infra*, sec. 32 III.

³ *Infra*, sec. 3 IV.

⁴ *Infra*, sec. 20 IV.

⁵ *Infra*, sec. 3 IV; sec. 6 VII; sec. 10 IV; sec. 37 I. Cf. the illustrative practice of melting down coins and exporting the bullion obtained in order to escape restrictions imposed upon the export of coins. See, e.g., Nettels, *The Money Supply of the American Colonies before 1780* (1934) 166 (England, 17th century); Arnauné, *La Monnaie, le Crédit et le Change* (4th ed., 1909) 378 (Mexico, 19th century).

The money concept is implicit in derivative phrases such as "sum", "payment", "debt", "capital stock". Even "value", in the law of a money economy, presupposes a measuring in terms of money. And only by virtue of the money element is a sale distinguishable from barter.

II. Definition of Money

The meaning of the word "money" is within certain limits mercurial, as is the meaning of so many legal terms. Sometimes it refers only to coins, sometimes it includes paper money;⁶ foreign money may or may not be encompassed;⁷ bank deposits are frequently, though not generally, spoken of as money.⁸ The shade of meaning intended will depend upon the circumstances.⁹ Cases have occurred in legal history where men's lives turned upon this interpretation.¹⁰

Notwithstanding its many applications, the term "money" must have a basic sense. By ascertaining that sense we shall illuminate the whole legal doctrine of money. And, in the practice of law, doubts about the meaning of "money" may be resolved by resort to this basic concept.

The essential characteristics of money have been described by many writers. J. Lawrence Laughlin,¹¹ for instance, enumerates three functions of money: (1) to be a common denominator of value; (2) to be a medium of exchange; (3) to be a standard of deferred payments. These functions, indeed, are universally acknowledged by economists. There is some controversy upon the question whether additional functions should be singled out. Laughlin himself adds the store-of-value function. The uses of money have sometimes been

⁶ *Infra*, sec. 7 I.

⁷ Generally, foreign money is not covered; *contra*, however, for instance, under the *Negotiable Instruments Law*, sec. 1 (2), and the *English Coinage Act*, 1870, 33 and 34 Vict., c. 10, sec. 6.

⁸ *Infra*, sec. 9 II.

⁹ In colloquial parlance, "money," like the German "*Geld*" and the French "*argent*," sometimes stands for "fortune" and this usage may be of moment in the interpretation of wills. *Infra*, sec. 9 III.

¹⁰ Under the old English law, as late as the 18th and even the beginning of the 19th century, many crimes connected with money were punishable as treason by death. See *Harrison's Case*, 1 Leach 180, 168 Eng. Rep. 192 (1777); *Rex v. Wilcox* (1808), in footnote 15 to Bayley, *Bills*, (1st Amer. ed., 1826) 6; *Rex v. Hill*, Russ. & Ry. 190, 168 Eng. Rep. 754 (1811). See also, Oliphant, "The Theory of Money in the Law of Commercial Instruments," (1920) 29 *Yale L.J.* 606 at 613.

¹¹ Laughlin, *The Principles of Money* (2d ed., 1919) 2.

elaborated even further, chiefly by German authors.¹² Still, we need not speculate on the number of functions separable for purposes of economic investigation, since the enumeration of uses does not enable us to define money for legal purposes.

In so far as the legal definition turns on the economic uses of money, its central use should be chosen for that purpose. That is what is usually done. There is a remarkable uniformity of judicial opinion,¹³ strongly supported by notable writers,¹⁴ to the effect that the function of being the common medium of exchange, is the basic one, and permits an unambiguous characterization of "money." Indeed, if goods and services are universally available in return for a definite medium of exchange, the value of all goods and services necessarily will be measurable in terms of that medium (function 1, *supra*), and that fact, in turn, will make of such medium an appropriate standard of deferred payments (function 3, *supra*), provided, to be sure, that there is enough confidence

¹² *E.g.*, by Helfferich, *Money* (tr. by Infield, 1927) 302; 1 Knies, *Das Geld* (2d ed., 1885); Moeller, *Die Lehre vom Gelde* (1925) 137. Among American writers may be cited Steiner, *Money and Banking* (1933) 26.

¹³ See *United States v. Arjona*, 120 U.S. 479 at 486 (1887) ("[money] . . . the circulating medium of exchange"); *Woodruff v. Mississippi*, 162 U.S. 291 at 300 (1895) ("Doubtless the word 'money' is often used as applicable to other media of exchange than coin."); *Ling Su Fan v. United States*, 218 U.S. 302 at 310 (1910) ("quality [of coin] as a legal tender and as a medium of exchange"); *United States v. Williams*, 282 F. 324 at 325 (D.C. Wash., 1922) ("Money is the standard of value, as well as the medium of exchange."); *Richard v. American Union Bank*, 253 N.Y. 166 at 175, 170 N.E. 532 (1930) (contrasting "medium of exchange" and "commodity"); *Vick v. Howard*, 136 Va. 101 at 108, 116 S.E. 465 (1923) ("the word 'money' . . . includes any lawful circulating medium of exchange"); *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 F.(2d) 166 at 172 (C.C.A. 8th, 1938) ("coins and currency actually circulating as a medium of exchange"). Similarly, *Reichsgericht*, Nov. 24, 1902, *J.W.* 1903, 32: "Cash [*bares Geld*] consists of those mediums of payment which, even though being legal tender, perform the function of law and economy of being universal mediums of exchange" ("*allgemeine Umsatzmittel*"; the meaning of this term lies somewhere between medium of exchange and medium of transfer). Sometimes money is merely referred to as the general or circulating "medium of payment," *e.g.*, by the *Reichsgericht*, July 11, 1924, 58 *Entscheidungen des Reichsgerichts in Strafsachen*, 255 at 256. The trouble is that "payment" presupposes the knowledge of what "money" is.

¹⁴ Menger, *Grundsätze der Volkswirtschaftslehre* (reprinted ed., 1934) 250; Mises, *Theorie des Geldes und der Umlaufsmittel* (2d ed., 1924) 2; Cassel, *The Theory of Social Economy* (1932) 375. Also English and American writers such as Jevons, *Money and the Mechanism of Exchange* (1875; 1921 ed.) 13; Walker, *Money* (1878) 2, and Kemmerer, *Money* (1935) 10, put the medium of exchange function first.

in the steadiness of the existing valuation.¹⁵ Laughlin thinks that historically the "standard" function must have preceded the "exchange" function, as appears from the primitive "cattle" standard.¹⁶ Yet probably both functions emerged simultaneously, even though the standard function may have prevailed in early times.¹⁷ In either case, once it has fully developed, the exchange function becomes the governing factor in all valuation.

The definition of money in terms of its exchange function, however, is not sufficiently specific to describe the essential characteristics of modern money. Cattle, cowry shells and other commodities may have operated as a common medium of exchange, albeit an imperfect one, within the primitive community.¹⁸ Modern money shows certain essential differences from the means of exchange employed in primitive times.

The evolution of these differences appears most clearly in the law, which is, among other things, the great technical laboratory of national economy. Modern law has indeed elaborated concepts and rules in response to the development of the exchange function which are unknown to, and inconceivable in, a primitive society.

Attempting then to house money in the field of law, the first shelter to think of is the group of fungible things, "of which", in the language of the Uniform Sales Act, "any unit is from its nature or by mercantile usage treated as the equivalent of any other unit".¹⁹ This classification of money is

¹⁵ This function, therefore, will tend to disappear in inflationary times. The German *Reichsgericht* repeatedly advanced the theory that at a certain point in the course of the German post-war inflation, the mark lost its function as a standard of value, "*Eigenschaft als Wertmesser*." See, e.g., Judgment of April 30, 1926, *R.G.Z.* 113, 136. This seems to be erroneous. Since, during the inflation, goods and services were everywhere sold for marks, such goods and services, at the time of the sales, must necessarily have been evaluated in terms of marks. What was lost was rather the mark's function of serving as a standard of deferred payments.

¹⁶ Laughlin, *The Principles of Money* (2d ed., 1919) 7.

¹⁷ See Burns, *Money and Monetary Policy in Early Times* (1927) 10.

¹⁸ Outstanding on this is Burns' volume. As is well known, "commodity money" played an important part in American colonial life. See *infra*, sec. 15 II.

¹⁹ *Uniform Sales Act*, sec. 76. The same definition is employed in the *Warehouse Receipt Act*, sec. 58. In both acts, due to their special purpose, reference is made only to goods. The Restatement, *Restitution* (1937), sec. 66(e) somewhat summarily defines as fungible "chattels or choses in action which are identical in kind or quality with other chattels, or choses in action."

old; it had, in substance, already been recognized in Roman law.²⁰ But how does money differ from other fungibles? Obviously, money differs from all other fungible things, such as wheat, coal, model T Fords, in that its composition is legally irrelevant. Money may be a gold piece, a silver piece, a copper piece, a paper bill or what-not. *Only the relationship of the money piece to a certain ideal unit* (dollar, pound sterling, franc, mark, etc.) has legal relevancy, inasmuch as the thing is treated as money and not as a mere piece of metal or a scrap of paper. Money, the concrete object, is thus a thing which, irrespective of its composition, is by common usage²¹ treated as a fraction, integer or multiple of an ideal unit.²²

III. The "Ideal Unit"

What, then, is that ideal unit? Originally "talent," "as," "pound," "mark," and other monetary terms were names of weights. But when people, while continuing to use the name of the weight, acquired the habit of giving and receiving the coined metal piece not by weight, but in reliance on the stamp, an independent value came into being detached from the actual value of the weight of the coin. Coinage, in saving the trouble of weighing, possibly adds to the value of the metal piece; that value may be impaired, on the other hand, by seigniorage, by wear, by defects and abuses resulting from an imperfect coinage technique. Thus the value of the monetary unit seems to be somewhat disconnected from any object in the real world, or as one may say, from materiality.

²⁰ "*Res quae pondere numero mensura constant*" Gal *Institutiones* III 90; *Dig. de rebus creditis*, 12.1.2. sec. 1. Fungibility as a basic concept of the civil law systems is derived from this source. The German Civil Code sec. 91 comes very close to the Roman definition. ("Fungible things, in the legal sense, are moveable things which in ordinary dealings are customarily determined by number, measure or weight.") The French Civil Code employs the concept of fungible things in art. 1291; the Spanish Civil Code in arts. 337, 1740. The Roman-German definition has been justly criticized. Weight is a sort of "measure" and the number sometimes is combined with measures, sometimes with pieces (100 cigars, one model T Ford). See M. Wolff in 4 *Ehrenbergs Handbuch des Handelsrechts* I (1917) 10. The American definition seems preferable. A case where money is expressly treated as a "fungible" thing is Trib. Rennes Oct. 18, 1917, *Droit Financier* 1918, 44. See also *infra*, sec. 19 III.

²¹ "Common" rather than "mercantile" usage because this usage, of course, is not confined to commercial situations.

²² Accord: Supreme Court of the Republic of Colombia, Feb. 25, 1937, 44 *Gaceta Judicial* 613 at 618, quoting the author's volume *Das Geld* (1925).

Nevertheless, in the consciousness of the social community, its significance is sufficiently distinctive. To take a modern example, even between March 6, 1933, when the United States went off the gold standard, and January 31, 1934, when a new gold parity of the dollar was fixed by the President, there was at any given moment a neat idea of what a "dollar" meant. The existence of a monetary unit is apparently a group-psychological phenomenon²³ which can be traced historically for each unit, yet is impossible to decompose analytically into simpler logical elements. The American dollar can be traced back, through many vicissitudes, to the Spanish "milled dollar" or peso, the value of which was adopted by Congress in 1792 as the basis of the American monetary system. Again, the Spanish peso may eventually be traced back to a weight unit. There exists an uninterrupted chain of value notions concomitant with the use of the peso-dollar terms. But the dollar concept existing at any given time is as little susceptible of definition as, say, the concept of "blue".

No more can be said than that "dollar" is the name for a value which, at any definite moment, is understood in the same sense throughout the community, and since goods and services are evaluated in terms of the dollar, that unit is a measure or a standard of value. Quite appropriately, therefore, the dollar is characterized in American legislation as "the standard unit of value".²⁴

The social operation and usefulness of the ideal unit is apparent. In dealing with coin or paper money people will look only at the arithmetical and easily ascertainable relationship between the individual money-thing and the unit. This means a tremendous simplification in dealings with money. At the same time, the abstract character of the unit yields perfect multiplicability as well as divisibility. We shall not investigate conditions existing in a primitive society; whatever the unit of valuation, it is bound to be abstract.²⁵

²³ A philosophical analysis of this consciousness has been attempted by Folbert Wilken, "*Zur Phaenomenologie des Geldwertbewusstseins*", (1926) 56 *Archiv für Socialwissenschaft und Socialpolitik* 417. Unfortunately, Wilken's discussion is not very lucid.

²⁴ "Gold Standard Act" of March 14, 1900, 31 Stat. 45, sec. 1, 31 U.S.C. 314: "The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine . . . shall be the standard unit of value".

²⁵ This was understood as early as Turgot's time. In his *Réflexions sur la Formation et la Distribution des Richesses* (1770) sec. 36, Turgot offers this example: "In a country where there is only one kind of

The concept of the "ideal unit", basic in the legal as well as in the economic field, has been elaborated primarily by German writers, although it also appears in non-German literature. Terminology is not uniform. The term, "unit of account", is sometimes used.²⁶ But there are other "units of account" both within and without the monetary field.²⁷ The same is true of the expression, "unit of value", which as mentioned before, is employed in American legislation.²⁸ Anglo-American writers generally prefer the phrase "money of account". But if any clarity is to be attained in the basic concepts of our subject matter, there must be a specific term for the tangible thing usually called "money". The expression, "money", therefore, should be preserved for "money-things", namely for coins and paper money. Employing the

sheep, one can readily take the value . . . of a sheep as the common measure of values, and it will be said that a barrel of wine . . . is worth a certain number . . . of sheep. In truth, there is some difference between sheep, but . . . people will take as unity the common value of a sheep of average age and of average quality. In this way, the indication of values in terms of sheep becomes something of a conventional language, and this word *sheep*, in the habits of trade, will signify a certain value which, in the meaning of those who understand it, carries the idea not solely of a *sheep*, but of a definite quantity of each of the most common commodities, which are regarded as equivalent to this value; and ultimately this expression will so thoroughly mean an imaginary and abstract value rather than a real sheep, that if by chance a sudden decimation of sheep occurs, and if in order to obtain one of them it is now necessary to give double the quantity of wheat or of wine that we gave previously, people will say that one sheep is worth two sheep. . . ." The writer was led to this passage by the article of Wilken, cited *supra*, n. 23. See also Burns, *Money and Monetary Policy in Early Times* (1927) 11.

²⁶ This term is widely employed, particularly in Germany ("*Rechnungseinheit*") by writers (Helfferich, Liefmann) and in legislation (*Münzgesetz* of August 30, 1924, R.G. Bl. 1924 II 254 sec. 1 [*"Im Deutschen Reich gilt die Goldwährung. Ihre Rechnungseinheit bildet die Reichsmark"*]). See also, Lord Russell of Killowen in *Adelaide Elec. Supply Co., Ltd. v. Prudential Assur. Co., Ltd.*, [1934] A.C. 122 at 148 (H. of L., 1933): "The question [is] whether there existed something (which is variously called a measure of value, a standard unit of value, money of account, and a unit of account) which would be called an Australian pound as distinct from an English pound. . . ."

²⁷ In times of monetary troubles, contracts are frequently couched in terms of the value of a definite metal unit rather than in terms of the local monetary unit. Thus in Germany during and after the inflation debts were described in terms of "gold marks" although no gold was circulating. See *infra*, sec. 25 IV.

²⁸ See also the quotation from Lord Russell of Killowen, in n. 26, *supra*. The same expression is chosen by such writers as Knapp, *The State Theory of Money* (1924) and Wagemann, *Allgemeine Geldlehre* (1923) ("*Wertseinheit*"). *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 F.(2d) 166 at 172 (C.C.A. 8th, 1938), confuses the concepts of "unit of value" and money, relying on the somewhat loose but substantially correct language of *U. S. v. Van Auken*, 96 U.S. 366 (1878).

name "money" for the abstract unit is undesirable, since it obliterates an essential distinction. It even suggests the preposterous idea that the unit, which is but one element in the concept of money, constitutes something like a subspecies of money.²⁹ One might simply speak of "abstract unit". Since there are, however, so many abstract units in general, the somewhat uncommon term "ideal unit" may be more appropriate to technical parlance.³⁰

The Latin languages possess a dual terminology: *monnaie-argent*; *moneta-danaro*; *moneda-dinero*. The terms "*monnaie*", "*moneta*", "*dinero*" seem to be preferred in technical usage.

IV. Interrelation of Monetary and Metal Value

It follows from the previous discussion that money, representative of the ideal unit, has a value of its own independent of the value of its components and resulting from the group-psychological process which we mentioned. It is misleading to term money a mere "symbol".³¹ Money may depreciate

²⁹ An elaborate analysis of the money-of-account concept has been advanced by Keynes, *A Treatise on Money* (1930) 3. Keynes takes "money-of-account" to be the money "in which debts and prices and general purchasing power are expressed"; it comes into existence, says Keynes, along with debts, and price-lists. The counter-concept is called by Keynes "money itself"; by delivery of it "debt contracts and price contracts are discharged". No disparity of monetary units, then, is presupposed by this terminology. On the contrary, the "money of account" is nothing but the money referred to in contracts or price-lists; it is "the money itself" to be paid in the future. There are not two types of money, but two ways of using it. A regular bank deposit would involve a "money of account"; yet, being used in discharge of contracts, i.e., as a medium of payment, it would, at the same time, be "money itself". Keynes' distinction therefore is not helpful in differentiating between his two types of money in a situation of primary importance.

³⁰ The *Reichsgericht* Oct. 13, 1933, *R.G.Z.* 142, 23 at 31, quoting the author, adopted the term "ideal unit".

³¹ In *Vietor v. Salt's Mfg. Co.*, 26 F.(2d) 249 at 255 (D.C. Conn., 1928) the court calls francs "a symbol of value" only to stress the point that they are not securities. Still, there is a different problem behind the "symbol" phraseology. Simmel, *Philosophie des Geldes* (5th ed., 1930), advances the theory that money is nothing but a symbol, devoid, as such, of any value of its own, and only expressing the reciprocal value relations of goods. Attaching value to money, though a regular phenomenon, would be accidental. Simmel gives no instance of actual valueless money which has operated as money, and his reasons are not convincing. Nevertheless, Simmel's volume, which seems to have escaped entirely the attention of Anglo-American writers, certainly is one of the most spirited and brilliant contributions ever made to the analysis of money.

Monroe, *The Monetary Theory before Adam Smith* (1923) 5, re-

entirely but then it will no longer be money. Money is valuable as such, and by reason of its peculiar efficiency in the social system, has a particularly intense usefulness.

Monetary value, despite its relative independence, may be connected with the value of a metal in three ways: first, through a historic or generic relationship, as pointed out above; second, through a relationship of monetary policy, inasmuch as one of the important objectives of monetary policy is to effect a tie between monetary value and a metal value; and third, through the public awareness of a tie, which is an aspect of the group-psychological process basic to the money concept. We shall not discuss the first (historical) relationship further. What is important to note is that the second and the third relationship may be present despite the absence of a legal "parity". The dollar situation from March, 1933 until January, 1934, has already been referred to; the factual stabilization, without legal ratio, of the national moneys of England and Holland is another well-known instance. Through the publication of rates of exchange, and of other pertinent data, the public is kept informed of the metal value of the respective monetary units.

However, it is not certain that money requires such a psychological tie-up with a metallic value. Russian rouble notes and coins are only allowed to circulate within Russia (as "inland money"), and their purchasing power is virtually determined by the government through compulsory measures of planned economy. The legal ratio between gold and the rouble is of slight and remote significance for that reason; a general awareness of the gold value of the rouble seems no longer to exist.³² In Germany, on the other hand, where the

fers to Plato, *Republic* Book II, sec. 12, where the philosopher, in discussing the economic structure of the community, points to the necessity of purchase and sale, from which a market, and money as a "σύμβολον τῆς ἀλλαγῆς" will originate. Apparently understanding those words to mean "symbol . . . of exchange", Monroe infers that in the opinion of Plato, "it is a matter of comparative indifference what material is used for money". However, the words probably only signify "token (or mark) to be exchanged". No more is presumably indicated by Plato than that money, technically appearing as a token, is the customary medium of exchange. The abstract connotation, at present associated with the term "symbol", seems not to have existed in Plato's time; at least the concrete meaning of the word was prevalent. Simmel does not refer to Plato.

³² For an analysis of the Soviet monetary system, see Arnold, *Banks, Credit and Money in Soviet Russia* (1937), particularly pp. 436 et seq.

reichsmark likewise has become an "inland money",³³ the value of which is hardly in accord with the official quotation, the common awareness is kept alive as a device to demonstrate the stability of the currency; still, it has lost in significance. Perhaps the clearest example of the absence of a tie between monetary unit and metal is presented in the historical phenomenon of the "*moneta imaginaria*".

V. The "*moneta imaginaria*"

On the continent, from the 13th to the 18th century, the circulating coins, domestic and foreign, were tarified (valued) by the sovereign in terms of the official local unit, with binding effect upon the subjects. For example, in France, the monetary unit from Charlemagne until the Great Revolution was the *libra* (*livre*) divided like the English pound, into twenty *solidi* ("sous", "shillings") or 240 *denarii* ("d", "*deniers*", "pence").³⁴ An important coin of the 15th and 16th century was the golden "*scutus solis*" ("*écu au soleil*") which was raised, by decree, in 1487, from 33s. to 36s. 3d., in 1518 to 40s., in 1533 to 45s. Other coins, all of them having individual names, such as "*royal*", "*couronne*", "*ange*", etc., were dealt with in a similar way. A French nobleman in 1560, according to a writer of the time, paid a servant £19.16s., his wages for several years, in at least eight kinds of coins, each with a name of its own.³⁵ The nobleman could not pay directly in "*libra*", "*solidi*" or "*denarii*". They were not available as concrete coins, existing only as abstract units, in the monetary consciousness of the community; the "*solidi*", and "*denarii*" as fractions of the "*libra*". "Raising the coin", i.e., increasing the tariff value of a given coin, was one of the early methods for the relief of debtors, in which class the sovereign was frequently found; the practice resulted in the deterioration of money, because raising the coin necessarily meant depressing the value of the abstract unit. It is comprehensible why this unit, the "*libra*", should have been

³³ *Infra*, sec. 37 I, sec. 39 I.

³⁴ Taeuber, *Geld und Kredit im Mittelalter* (1933) 249. The French instances in the text are taken from Dr. Taeuber's book. The system described seems to have been first clearly presented by Alfred Nagl, *Die Goldrechnung und die handelsmässige Geldrechnung im Mittelalter* (Vienna, 1894). Walker, *Money* (1891) 290, discusses the "*moneta imaginaria*" under the denomination of "ideal unit".

³⁵ See Taeuber, *op. cit.*, 255 n. 740.

labelled a "*moneta imaginaria*" by contemporary writers.³⁶ The relationship between the libra and the metal value differed from that in modern monetary systems, in its indirect and complex nature, which was the consequence of the legal and factual effects of the tariffing decrees.³⁷ The value of the coins did not depend on the value of the unit, but the value of the unit was determined by the value of the coins. The "nominal" value of the latter, called "*valor impositus*" or "*impositus*" was to be ascertained from the tariff rather than from the inscription of the coins.

This is a somewhat over-simplified description of what happened, specifically in France, where the livre, from the time of Charlemagne to the Revolution, fell in value more than 98 per cent,³⁸ by virtue of the elaborate and permanent deterioration technique applied by the French kings. In a lesser degree the coins of Italy and other countries followed the same course.³⁹ In England likewise, the practice of "raising the coin" was by no means unknown,⁴⁰ and the penny of ster-

³⁶ Taeuber, *Molinaeus' Geldschuldlehre* (1928) 59; see also 1 Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre* (1874) 184 at n. 67. Sometimes the expression *moneta imaginaria* is applied to units of account, *infra*, sec. 25 n. 50.

³⁷ Taeuber, *Geld und Kredit im Mittelalter* (1933) 266: "The exchange value (*Tauschwert*) of the *libra* was equal to the best among the circulating coin types, provided that the whole of the circulating types entirely satisfied the demand for coin".

In the 18th century an "imaginary" rupee was established in East India on the advice of the famous economist Sir James Stewart. See the interesting report in Walker, *Money* (1891) 294. As to the *moneta imaginaria* of the American Colonies, see *infra*, sec. 15 III.

³⁸ The law of *Germinal* 17, Year XI (March 28, 1803), 14 Duvergier, *Collection des Lois* 176 rated the franc, the former livre at 5 grams silver. Estimates of Charlemagne's livre vary from 367.13 to 436.8 and even 489.5 grams silver but center in the neighborhood of 400. See e.g., von Inama Sternegg, *Deutsche Wirtschaftsgeschichte*, vol. 1 (1879) 456; vol. 2 (1891) 410 n.; Luschin von Ebengreuth, *Allgemeine Münzkunde und Münzgeschichte* (2d ed., 1926) 134, 160. The loss in purchasing power was still greater than the loss in weight.

³⁹ 1 Sombart, *Moderner Kapitalismus* (1921) 445, gives indices of the depreciation of money for the various European countries.

⁴⁰ See Breckinridge, *Legal Tender* (1903) 41; and the tables in Feavearyear, *The Pound Sterling* (1931) 348 et seq. On the raising of the noble under Edward IV from 8s. 4d. to 10s., see Y.B. 9. Edw. IV., 49 (Hil. T., pl. 6) (1470). Tariffing was locally accomplished through public crying of the royal proclamation. The case of *Bostock v. Crimes*, Selden Society, *Select Cases in the Court of Requests* 191 (1552) deals with a proclamation of 1551 which lowered the "testoon" from 12d. to 9d. and the "groat" from 4d. to 3d. (Raising, if excessive, was sometimes followed by lowering.) While the proclamation was being read for the first time in the city in one part, a debtor in another part hastened to his creditor and tendered to him his debt in testoons and groates at the old value. The creditor objected and finally ejected the debtor. At that

ling silver, was debased between the tenth and the nineteenth centuries from 24.00 to 7.27 grains troy.⁴¹ On the whole, however, the relationship of the monetary unit and the metal value was incomparably better maintained in England than on the continent.⁴² Nevertheless a change in the metal value of money sometimes led to strange distortions in the application of old laws.⁴³

SECTION 2

NOMINALISM AND METALLISM. PURCHASING POWER

I. Metallistic Conceptions

Misunderstanding of the interrelation between modern monetary units and metal values is not infrequent. In part, such misunderstanding is caused by misleading statutory formulas. For instance, the French stabilization law of June 25, 1928, art. 2, provided: "The franc, French monetary unit, is constituted by 65.5 milligrams of gold 9/10 fine."¹ Similar language is found as early as 1803. The French law of that year defines the franc as a monetary unit of "5 grams of silver

moment, according to the testimony of a witness, the proclamation procession passed the house. The result of the ensuing litigation is not known.

⁴¹ See Feavearyear, *op. cit.*, 350.

⁴² See Taeuber, *Geld und Kredit im Mittelalter* (1933) 256.

⁴³ At least as early as the 13th century (2 Pollock and Maitland, *History of English Law* [2d ed., 1899] 496), English law imposed the death penalty for the thefts of objects exceeding 12d. in value. Juries since the XIV Century avoided the application of the law by heavily undervaluing the things stolen. 3 Holdsworth, *A History of English Law* (4th ed., 1935) 367, see also 4 Blackstone, *Commentaries* * 238. The same phenomenon appears in the handling of the "benefit of clergy" (a more lenient punishment, originally reserved to clergymen and later extended to other delinquents, for some types of thefts not exceeding 40s. 4 Blackstone, *Commentaries* * 365-* 374, * 240). In 1732 a jury found two guinea and two half guinea coins to be together worth less than 40s., and similarly in 1808 a £10 Bank of England note was valued at 39s. Kenny, *Outlines of Criminal Law* (15th ed., 1936) 208. Furthermore, at the beginning of the 15th century, Lyndwood, *Provinciale* (Oxford ed., 1679) 171, note a, raised the question whether certain jurisdictional amounts of ancient standing were to be computed on a gold basis.

¹ D.P. 1928 IV 313 at 317 (tr. 1928 *Federal Reserve Bulletin* 570). The definition of the Monetary Law of Oct. 1, 1936, D.P. 1936 IV 393, (tr. 1936 *Federal Reserve Bulletin* 878) is somewhat different. English translations of most of the monetary laws of the more important countries are to be found in *Monetary and Central Bank Laws*, League of Nations, Economic Intelligence Service, 1932.

9/10 fine."² The German monetary laws are couched in similar language.³ Such provisions are properly part of administrative law. Declaratory of the national monetary policy, they are binding upon all the agencies of government; supplementary and auxiliary provisions may be added to them by the legislature. The legal ratio declared by statute is, therefore, in the nature of a program or of a standard of value, rather than of a conclusive determination of value. It would, indeed, seem to be impossible to make such a determination of value conclusive.⁴ How far the country, or the government, will succeed in maintaining the declared ratio depends upon events to come which when they happen only too frequently show the limits of governmental power. The legislature is not a modern Joshua to command the wandering value of gold to stop in mid-air. When Germany abandoned the gold standard and the mark plunged into an abyss, the gold standard remained on the statute books. Being merely a program made inoperative by events, it had no longer, however, any legal significance.⁵ The misconception of such statutory provisions as identifying the ideal unit with the metal unit and as creating thereby a

² Law of 17 Germinal year XI (March 28, 1803), 14 Duvergier, *Collection des Lois* 176. For the text of the revolutionary and post-revolutionary laws see also André Mater, *Traité Juridique de la Monnaie et du Change* (1925) 408, 413.

³ The "mark" was legally defined to be "the tenth part of a gold coin", a pound of pure gold yielding 139-1/2 pieces of such coins. Laws of Dec. 4, 1871, *R.E.G.* 1871, 404, sec. 2; and July 9, 1873 ("Coinage Law"), *ibid.*, 1873, 233 art. 1.

⁴ The so-called Gold Standard Act of March 14, 1900, 31 Stat. 45, 31 U.S.C. 314, reads as follows: "The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity." While this wording makes rather clear the programmatic nature of the provision, the Supreme Court of the United States appears to regard it as a binding rule of valuation. *Perry v. United States*, 294 U.S. 330 (1935), *infra*, sec. 29 II. The programmatic character of the President's Proclamation of January 31, 1934 (No. 2072), 48 Stat. 1730, 31 U.S.C.A. 821, note, seems to be unmistakable. It "fixes" the weight of the gold dollar to be 15-5/21 grains 9/10 fine. This merely refers to the weight of (hypothetical) gold coins, not to the value of an abstract unit. The English *Coinage Act*, 1870, 33 and 34 Vict., c. 10, does not define the pound; the weight and the fineness of the various coins of the system being indicated in the First Schedule appended to the Act.

⁵ The German courts skirted the crucial point, avoiding the problem of the legal ratio. See *Reichsgericht*, Jan. 11, 1922, *R.G.Z.* 103, 384 at 388; Supreme Court of Bavaria, Sept. 30, 1922, *J.W.* 1923, 126 at 127; also *Reichsfinanzhof*, Jan. 31, 1922, 8 *Sammlung der Entscheidungen und Gutachten des Reichsfinanzhofs* 100. *Infra*, sec. 22 II.

The diversity of scientific opinions on the subject reflects, in a measure, the antagonisms that prevail in politics and lay discussion. In the United States, the battle has been fought around the slogan "hard money". At the center of the fight has been a feeling that only hard money safeguards the economic and political liberty of the (moneyed) individual, and makes finance-capital independent of distrusted government.¹⁵ This sentiment not only figures prominently in the controversy on the money concept, but also plays a frequent and important rôle, if only subconsciously, in legal discussion; it is in part the cause for the bitterness of feeling upon the Legal Tender cases and the Gold Clause cases. In the political arena, it has, perhaps, caused the inflationists to drape themselves in silver rather than paper, a circumstance which suggests that hard money is not necessarily good money.

Be that as it may, there can hardly be any question today that the concept of money must be extended to include paper money. Despite certain differences, coin and paper money, having an identical relationship to the ideal unit, exhibit the same basic characteristics; they are subject, in the main, to the same rules and run the same course. In a sense, the peculiar properties of money are most readily evident in paper money. Certainly no one would refuse to describe inflation as a monetary process for the reason that paper money is not money. Indeed, the suggestion is made by economists that not only coins, but bank deposits also ("deposit currency") are to be treated as "money".

The theory of money set forth in the preceding discussion is commonly labeled "nominalistic" (or "chartalistic") in opposition to the "metallistic". We shall employ the traditional terminology, even though it is not entirely exact. As has appeared, the essence of nominalism consists in the arithmetical relationship of a given money to the pertinent

Iacchia & Co. v. Land Bank of Egypt, judgment of Dec. 29, 1927, *J.D. Int.* 1928, 769. Metallistic views also prevail, in the valuable article of Eder, "Legal Theories of Money," (1934) 20 *Corn. L.Q.* 52 and in Bakewell, *Past and Present Facts About Money in the United States* (1936), reviewed by the present writer in (1937) 37 *Col. L. Rev.* 162.

¹⁴ Goldschmidt, *Handbuch des Handelsrechts* (1868) 1071: "A legal theory common to all of the so-called monies does not exist."

¹⁵ Under the Independent Treasury system (independent of the state banks) payments to, and by, the government were to be made only in gold and silver coin or in U.S. Treasury notes which, however, were only temporarily in circulation. Act of Aug. 6, 1846, 9 Stat. 59, secs. 18, 19.

ideal unit (dollar, franc, etc.). The name ("*nomen*") of a money is, of course, irrelevant. It would, perhaps, be more accurate to employ the term "numeralism" rather than "nominalism". And for a doctrine which identifies money with a definite quantity of purchasing power, a term such as "valoristic" may be more appropriate than "metallistic". However, it seems better to avoid an artificial nomenclature.

The difference between the two schools of thought is sometimes understood in a narrower sense. That doctrine, according to which existing debts follow the depreciation of the monetary unit, is called "nominalism", the opposing doctrine, "metallism".¹⁶ But that is a special problem, namely, a debt problem. Even where an adaptation of debts to the movement of metal prices is attempted, the "nominalistic" and therefore inelastic nature of the media of payment will make itself felt. Moreover, entire coordination between debts and metal value (or any other commodity value) is impossible. Where, after inflation, debts have been revalued, the method has not been complete coordination of which, indeed, no example is known.¹⁷

II. Money and Commodities; Securities

The metallistic formula is related to the familiar proposition, supported by John Stuart Mill,¹⁸ among others, that "money is a commodity". Those who maintain this tenet do so with an eye to the quantity theory of money, or speaking more generally, to the fact that the value of money, like that of other things, depends on the operation of economic factors. Attempts by the sovereign or by the state to fix the value of money by fiat are in this view predestined to fail. The prevalence of the "commodity" doctrine of money in French economic and legal literature is noteworthy¹⁹ and reflects the

¹⁶ Particularly by Latin writers such as Hubrecht, *Stabilization du Franc et Valorization des Créances* (1928); 7 Planiol-Ripert, *Traité Pratique de Droit Civil Français* (1931) 505.

¹⁷ See *infra*, sec. 24, and, as to the significance of the nominalistic principle in taxation law, sec. 11 V.

¹⁸ Mill, *Principles of Political Economy* (Laughlin ed., 1885) c. 15 at 404.

¹⁹ A survey is given by Mater, *Traité Juridique de la Monnaie et du Change* (1925) 29, who quotes among others, Daguesseau, Montesquieu, Quesnay and Turgot. Chevalier, *La Monnaie* (1866) might be cited likewise. Mater himself is rather an extreme follower of the commodity doctrine of money. *Contra*: Ascarelli, *La Moneta* (1928) 61. A sounder view is also advanced by Nogaro, in *Modern Monetary Systems* (1927).

unhappy French experience not only with assignats but with the numerous monetary experiments of earlier centuries. The doctrine even finds occasional legislative expression during the French Revolution.²⁰ The doctrine is, however, inaccurate and misleading, in economics and even more so in law, being an unfortunate formula for the underlying truism of the dependence of the law upon the economic factor. As has been pointed out above, money differs, in its essential characteristics, from those other goods which are commonly and conveniently termed "commodities". It is for that reason that barter differs from sale.²¹ The unsoundness of the terminology criticized appears from a Canadian case where the plaintiff sued on a promissory note for \$482 "in Canadian bills" which were issued by, and circulated in, the Canadian Provinces as legal tender. The court, citing McCulloch's *Principles of Political Economy*, held that the bills were not money, "have no intrinsic value as coin has. They represent only, and are the signs of value. Money itself is a commodity . . . it is the thing signified." The note was therefore declared invalid since promissory notes have to be phrased in terms of money.²²

Still, pieces of money may in special cases be dealt with as commodities.²³ That money may have a "second use", namely, to be purchased or exchanged, has been recognized ever since there has been a theory of money. In the language of Thomas Aquinas, money, if sold or exchanged, is "meas-

²⁰ During the revolutionary paper currency period, there was at times a regular trade in gold and silver coins which, of course, enjoyed a considerable and growing premium. Decrees regulating this trade were sometimes referred to in the statutes as decrees "declaring money a merchandise." Mater, *Traité Juridique de la Monnaie et du Change* (1925) 30. The language of the statutes may have been influenced by dominant commodity doctrine; but in view of the circumstances, the phrase seems accurate even from a nominalistic viewpoint, if one construes the word "money" as "gold and silver coin" which in fact were meant. In any event the terms of the revolutionary legislation are by no means helpful in building up a monetary theory.

²¹ The famous controversy of ancient Roman law whether barter be a sale (*pro*: Sabinus; *contra*: Proculus, and their followers) has recently been illuminated by Taeuber, *Geld und Kredit im Mittelalter* (1933) 316. Sabinus seems merely to have been extending certain sales rules to barterers, and only under special conditions, rather than denying the obvious disparity of the two types of transactions.

²² *Gray v. Worden*, 29 Upper Canada Queens Bench Rep. 535 (1870).

²³ See *Peabody v. Speyers*, 56 N.Y. 230 (1874); *Fowler v. New York Gold Exchange Bank*, 67 N.Y. 138 (1876), regarding American gold coins; and generally *infra*, sec. 4 at n. 75.

ured, not a measure"; "*mensuratum*", not "*mensura*".²⁴ Its "intrinsic" or exchange value, as distinct from the "extrinsic" or nominal value,²⁵ is controlling in this situation. The latter value is, on the whole, a matter of law; the former is the result of economic conditions. While the intrinsic value is subject to fluctuations, the extrinsic value is invariable. This invariability, creative of the so-called money illusion,²⁶ is neither a fiction of the law nor, as has been asserted by a noted economist,²⁷ is it the adoption by the law of a naïve popular belief. It is but a logical conclusion from the fact that the ideal unit is not a monetary phenomenon, but has, of course, continuity in time.

Among commodities proper, "securities" ("*Wertpapiere*", "*effets*", "*titoli di credito*") such as checks, bills of exchange, and bonds, are closest to money.²⁸ Yet they are distinct from it in that they are primarily dealt with as representative of rights incorporated in the paper,²⁹ not merely as multiples, integers or fractions of the monetary unit; and consequently the parties to the deal will consider the special incidents of the right incorporated, such as the solvency of the issuer, the time and place of payment, and so on. The simple relationship to the ideal unit would not be decisive as in the case of money. Even a "certified check" is not money, although it may pass from hand to hand.³⁰ And it was well said by a

²⁴ See 2 Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre* (1883) 200, which in spite of some recent criticism (Taeuber, *Molinaeus' Geldschuldlehre* (1928) 15, note 49) constitutes an outstanding introduction into medieval economic and legal thought. The distinction between the two ways of using money first appears in Aristotle, *Politics*, bk. I, c. 9.

²⁵ The terms "extrinsic" and "intrinsic" value have been preserved in modern phraseology. See, e.g., 28 Stat. 4 (1893), 31 U.S.C. 311. ("It is hereby declared to be the policy of the United States . . . to coin both gold and silver into money of equal intrinsic and exchangeable value. . . .") According to *Bank of the State of North Carolina v. Ford*, 5 Ire. (27 N.C.) 692 at 698 (1845), the notion of "intrinsic value" is confined to coins. It is their "true, inherent and essential value, not dependent upon accident, place, or person, but the same everywhere and to everyone".

²⁶ Irving Fisher, *The Money Illusion* (1928).

²⁷ Mises, *Theorie des Geldes und der Umlaufsmittel*, (2d ed., 1924) 179.

²⁸ The distinction between "security" and "money" was early indicated; Lord Mansfield in *Miller v. Race*, 1 Burr. 452, 97 Eng. Rep. 398 (1758); *Southcot v. Watson*, 3 Atk. 226 at 232, 26 Eng. Rep. 932 (1745).

²⁹ Reichsgericht, Dec. 10, 1924, R.G.Z. 109, 295 at 297.

³⁰ *Dike v. Drexel*, 11 App. Div. 77, 42 N.Y.S. 979 (1896); Appellate Court of Koenigsberg, Dec. 22, 1930, J.W. 1931, 3148 (check certified by the Reichsbank). Application of "money" law was further declined

Wisconsin court in a case involving banknotes: "Whatever is at a discount . . . does not properly represent dollars and cents, and is not money."³¹

Generally, however, it should be kept in mind that the line of demarcation between money and securities may shift in the course of time.

III. Purchasing Power and Index Numbers

In recent times the concept of extrinsic value as expressing a money-metal relation, has lost much in significance. Instead, the method of defining the value of money in terms of index numbers, has come to the fore. While the conception of "index numbers" or averages of commodity prices is about two centuries old,³² within the last fifty or sixty years they have won general public attention, particularly since the task of elaboration and publication of index numbers has been taken over by official agencies.³³ The period of monetary troubles which set in with the outbreak of the World War, has increased considerably scientific as well as popular interest in indices. Index numbers seemed to offer a means for restoring firmness and reliability to a reeling world. The notion of purchasing power of money, concomitant to the employment of index numbers, entered the consciousness and common speech of the community. Unrealistic, if not fantastic programs, always frequent in monetary discussion, were bound to thrive on "index numbers". The idea was propagated that long-term contracts should generally be made on an index basis for which the impressive name "tabular stand-

by the Appellate Court of Paris, Nov. 30, 1921, *D.P.* 1924 II 25 (*ordre de virement*—payment order—of the *Banque de France*), and Supreme Court of Austria, April 29, 1925, *Die Rechtsprechung* 1926, 75 (*vaglia cambiario*, an Italian type of promissory note drawn by one bank to another). The case of Appellate Court of Jena, May 23, 1924, *Archiv für Rechtspflege in Sachsen, Thüringen und Anhalt* 1924, 197, is different. During the German inflation, a manufacturer, there being a great scarcity of mediums of payment, paid wages by checks drawn in sets and in round figures. The Court held the manufacturer had violated the Emergency Money Act of July 17, 1922, *R.G.Bl.* 1922, I 693, forbidding unauthorized issuance of circulating media of payment. *Infra*, sec. 8, n. 14.

³¹ *Klauber v. Biggerstaff*, 47 Wis. 551 at 561, 3 N.W. 357 (1879).

³² For a brief history of index numbers see Walsh, "Index Numbers", 7 *Encyclopedia of the Social Sciences*, and Warren & Pearson, *Gold and Prices* (1935) 23.

³³ They are listed in *Index Numbers and Wholesale Prices in the United States and Foreign Countries*, U. S. Bureau of Labor Statistics, No. 284 (1921).

ard" was suggested.³⁴ That term itself exaggerates the importance of its object. "Tabular standard" can easily be ranked, and has been ranked in economic textbooks, with such concepts as the "gold standard" and the "double standard". Such a classification is confusing inasmuch as the "tabular standard" unlike the "gold standard" does not characterize a monetary system, but signifies only a scheme of contractual provisions.³⁵ The value of the scheme, too, has been overrated. So distinguished an economist as W. St. Jevons advanced the opinion that the "tabular standard" would contribute to the stability of social relations and render commercial crises less intense.³⁶ Its use has been advocated by legal writers also.³⁷ The facts, however, are far from warranting such high expectations.³⁸ Still smaller is the chance of giving effect to proposals such as Professor Irving Fisher's scheme of a "compensated dollar."³⁹ His plan is not only a contractual device but really an attempt to link the monetary unit itself with the development of index numbers, essentially by making gold certificates, the main vehicles of the proposed currency, convertible into gold bullion according to the quarterly variations

³⁴ This term had first been used by G. Poulett Scrope in 1833; see Jevons, *Money and the Mechanism of Exchange* (ed. of 1921) 322.

³⁵ The term "tabular standard" is loosely used in economic discussion, e.g., by W. C. Fisher, "The Tabular Standard in Massachusetts' History" (1913) 27 *Qu. Journ. of Econ.* 416 and likewise by Kemmerer, *Money* (1935) 105, n. 1, for the 1742 Massachusetts legislation, which may be characterized as pre-planned revaluation, *infra*, sec. 24 n. 1. There was no "tabular standard" (1) because the Massachusetts rule did not contemplate contracts in general, but only one sort of legal tender ("old tenor" notes having continued to be the common measure of value, Fisher, *loc. cit.*, at 423, n. 2), (2) a fall in commodity prices was not to be taken into account under the Massachusetts laws, (3) there were no "tables" offering a strictly arithmetical yardstick, but only equitable consideration of increases in price was required. The Massachusetts "soldiers' depreciation notes" of 1780, *infra*, p. 23, n. 49, likewise described by W. C. Fisher, *loc. cit.*, are closer to a "tabular standard", though very limited in scope and certainly no evidence in favor of it.

³⁶ *Loc. cit.*, *supra*, n. 34.

³⁷ Thus by Dawson and Coultrap, "Contracting by reference to price indices", (1935) 33 *Mich. L.R.* 685; and by Nogaro (who is primarily an economist) in "La clause 'payable en or'", *Revue Trimestrielle du Droit Civil* 1925, 1, at 28, making reservations only as to short-term contracts.

³⁸ On the "defects of Tabular Standard" see Kemmerer, *Money* (1935) 106.

³⁹ *Stabilizing the Dollar* (1920); *The Purchasing Power of Money* (1922). Still more extreme and even abstruse ideas on "index-currency" have been advanced in Germany. They are ably analyzed by Preyer, "Das Phantom der Indexwährung" (1932) 31 *Bankarchiv* 317.

of the index level. The whole plan has generally met with competent criticism,⁴⁰ one simple objection being that the obligation to deliver gold during one quarter of the year being determined by the index numbers for the preceding quarter, the government would be at the mercy of speculators in times of major fluctuations, and that speculation in the dollar at the expense of the community would be stimulated thereby. Cessation of gold circulation has stripped the plan of actual interest.

On the other hand, the notions of purchasing power and index numbers are by no means useless in the legal field. It has proved no real hindrance to their use in legal transactions that there is no recognized index of general purchasing power and that the index of living cost (common substitute for a general index of purchasing power) is considered too crude by outstanding economists.⁴¹ For the needs of law administration and of business as well, the official indices, at least, are sufficiently accurate. It is somewhat striking that neither the recommendations nor the warnings of economists are in accord with actual legal experience.

It is in the field of contracts that the use of index numbers is comparatively most frequent.⁴² They may furthermore be employed in the determination of damages and of claims for maintenance.⁴³ Belgian legislation explicitly provided that in awarding damages the courts should regard the "purchasing power", rather than the gold parity, of the franc.⁴⁴ German law permits the courts to give judgment in terms of an official index,⁴⁵ and this device, though it did not find much favor, was sometimes used for the adjudication of maintenance claims.⁴⁶ Index numbers may also be helpful in revaluation⁴⁷ and, under American law, in the determination of "reproduction cost" for the calculation of public utility rates.⁴⁸ They have been resorted to by legislatures, particularly in order to adapt wages and salaries of state officials to fluctua-

⁴⁰ See, Nogaro, *Modern Monetary Systems* (1927) 194; Reed, *The Commodity Dollar* (1934); Kemmerer, *Money* (1935) 110.

⁴¹ Such as 1 Keynes, *A Treatise on Money* (1930) 53.

⁴² *Infra*, sec. 31 II.

⁴³ *Infra*, sec. 22 II.

⁴⁴ *Infra*, sec. 22 at n. 40.

⁴⁵ Decree of May 13, 1924, *E.G.Bl.* 1924 I 552, sec. 9.

⁴⁶ See, e.g., *Landgericht of Berlin*, Sept. 22, 1934, *J.W.* 1934, 3018.

⁴⁷ *Infra*, sec. 23 at n. 35.

⁴⁸ *Infra*, sec. 22 V.

tions in the purchasing power of the monetary unit.⁴⁹ This device, however, is a budgetary hazard since the state is unable to scale its revenues in the same way; enactment of such laws may therefore offer a strong inducement to inflation.⁵⁰ Generally speaking, the uses here suggested should not cause the significance of index numbers to be overrated.

SECTION 3

MONEY AND THE STATE

I. *The Sovereign's Powers and Prerogatives— The Kossuth Case*

Coinage has developed from antiquity as a right inherent in the supreme power of the state.¹ Thus in the laws of imperial Rome the emperor appears as vested with the prerogative of coinage.² On the Continent, after the decline of the Frankish Kingdom, the right of coinage degenerated into a source of personal profit to the sovereign. The profit accrued to him from the levy of dues for coinage, part of the metal being kept as "seigniorage." Another method of exploitation was the lease of privileges of coinage.³ But most important

⁴⁹ See *Economy Act* March 20, 1933, Title II, sec. 3a, 48 Stat. 8 at 13; French Law of Oct. 1, 1936, art. 15, D.P. 1936 IV 393. Numerous decrees of this kind were enacted in Germany during the inflation: decrees of August 30, Sept. 27, Oct. 23, Oct. 24, Nov. 22, 1923, R.G.Bl. 1923 I 845, 912, 990, 993, 1110; of May 13, 1924, *ibid.* 1924 I 552, sec. 9. An American instance of similar legislation during an inflationary period is the Massachusetts Act of 1780, c. 29, 5 *Acts and Resolves of the Province of Massachusetts Bay* 1133, creating "soldiers' depreciation notes". These promised the soldiers payments additional to their nominal amounts in case of a rise in prices of certain commodities. W. C. Fisher, *op. cit.*, *supra*, p. 21, n. 35, at 416, 436.

⁵⁰ This was the Austrian experience. Wahle, *Das Valorisationsproblem* (1924) 141 at n. 1.

¹ To be sure, the earliest phase is coinage by priests, merchants and other non-state agencies. For a description of the development from this phase to state coinage, see Burns, *Money and Monetary Policy in Early Times* (1927) 75 *et seq.*, 83 *et seq.*

² This statement is subject to qualifications the discussion of which would be outside the scope of this paper. See Burns, *op. cit.*, 100; and G. Salvioi, *Il Diritto Monetario Italiano Dalla Caduta Dell'Impero Romano ai Nostri Giorni* (1889) 5, 75.

³ Such leasing resulted in a division of powers of coinage. This fact caused German writers to distinguish between "*Münzhohet*" and "*Münzregal*" which in Blackstone's language might be translated as *majora* and *minora regalia* of coinage (1 Blackstone, *Commentaries* *241), the former constituting the inalienable control of the Sovereign over coinage, the latter being a profitable and transferable right of manufacturing

is that centuries of absolutism developed the practice, described above,⁴ of degrading the currency, which was frequently done for the financial profit of territorial rulers and the relief of their debts.

In Germany, monetary misrule was the greater because there were about 250 rulers who enjoyed the right of coinage.⁵ But the abuses, it was shown, were most disastrous in France. The absolute control of the currency held by the French kings is reflected in the doctrines of the French jurists of the time. The royal practice of recalling and demonetizing circulating coins, offering in exchange coins of equal nominal value but of less weight or fineness, caused Pothier (1695-1772) to attribute to the sovereign a quasi-ownership of the totality of the currency: "the coins belong to individuals only as signs of the value which the prince has decided they should represent; therefore if it pleases the prince that other coins should henceforth be the representative signs of the value of things, individuals have no right to retain the former coins".⁶ Pothier's doctrine has disappeared with the absolute monarchy and its vices, but its traces are still visible in the law of France.

In England where the abuses of the coinage were not so great as in France, coinage was considered a prerogative of the Crown, not requiring parliamentary assent. The prerogative included the right to "change . . . the form and the substance" of "his [the King's] money" and "to enhance or debase the value of it, notwithstanding that the form and substance continueth as it was before".⁷ This right fell into desuetude toward the end of the seventeenth century. Money

coins according to rules laid down by the Sovereign. However, it seems impossible to draw a helpful line of demarcation. See Ad. Wagner, *Sozialökonomische Theorie des Geldes und Geldwesens* (1909) 541. Royal grants of the coinage privilege were not unknown in England, see *Mixed Money Case*, 2 Howell State Trials 114 at 118; Davis, 18 at 20, 80 Eng. Rep. 508 at 509 (Privy Council, 1604). See also the provisos near the end of 17 Ed. 4, c. 1 (1477/78).

⁴ *Supra*, pp. 10-11.

⁵ See, e.g., 2 Schmoller, *Grundriss der Allgemeinen Volkswirtschaftslehre* (1904) 70; 2 von Inama-Sternegg, *Deutsche Wirtschaftsgeschichte* (1891) 393; 3 *ibid.* part 2 (1901) 365; Jastrow, *Prinzipienfragen in den Deutschen Aufwertungsdebatten* (1937) 48.

⁶ *Traité du Contrat de Prêt de Consommation*, par. 37.

⁷ *The Mixed Money Case*, *supra*, n. 3, 2 Howell State Trials 114 at 119. This case offers an amazingly scholarly and ample documentation of a legal, historical and philosophical character on early English monetary law and practice. Further material is to be found in Breckinridge, *Legal Tender* (1908) 9.

became a matter for legislation. In the American colonies, the English government exercised its monetary powers, which were considered superior to those of the provincial legislatures. Its activity was particularly effective with regard to colonial paper money.⁸

The fundamental problem of the legal relationship between the government and money⁹ was presented to the English courts in the law suit of the Emperor of Austria against the famous Hungarian patriot, Louis Kossuth. After the army of the Hungarian Parliament had been defeated by the troops of the Emperor, Kossuth, then by parliamentary resolution dictator of Hungary, fled to London. In order to finance the continued fight against the Emperor, Kossuth ordered a London firm to print Hungarian paper money signed "in the name of the nation: Kossuth, Louis". Kossuth's view was that he still had a mandate from the Hungarian nation, the Emperor having been dethroned by the Hungarian Parliament. On the petition of the Emperor,¹⁰ the Court of Appeal in Chancery affirming the lower court, enjoined Kossuth and his printer from manufacturing the notes. The plaintiff had not alleged an invasion of his rights of sovereignty or any other political grounds, English courts having no jurisdiction over matters of that kind. The injunction was issued to protect the "property right" of the Emperor, derived from the "*jus cudendae monetae* belonging to the supreme power in every State".¹¹ This seems to be neither consistent in itself—since the "supreme power" is sovereignty—nor in harmony with the modern conception of money then prevailing in England as well as in other civilized countries.¹²

⁸ *Infra*, sec. 15 IV.

⁹ Gény, "*Quelques Observations sur le Rôle et les Pouvoirs de l'Etat en Matière de Monnaie et de Papier Monnaie*" (*Mélanges Hauriou*, 1929), 389 and Gréciano, *Du Rôle de l'Etat en Matière Monétaire* (1896) are not very helpful.

¹⁰ It is somewhat surprising that a law court proceeding became necessary, Kossuth clearly having violated the law of asylum and having thereby challenged the police power of the English government. Probably the latter, because of Kossuth's world-wide popularity, preferred to commit the Emperor to the law court proceeding in conformity with Kossuth's pretense that the controversy was a legal one.

¹¹ *The Emperor of Austria v. Day and Kossuth*, 3 De G. F. & J. 217 at 234, 45 Eng. Rep. 861 (1861).

¹² The court mentions that the National Bank of Austria, by the Emperor's authority, did issue notes which formed the circulating medium of Hungary and that from this arrangement a profit accrued to the Emperor. The profit was not specified by the court; probably a share

In federations, monetary power will naturally vest only in the federation. This is ordinarily provided for by Federal constitution.¹³ Litigation regarding the meaning of the term "money", at least where the term is used in a technical sense, therefore involves a "federal question" of which the federal courts may have jurisdiction.¹⁴

II. *Limits of the Monetary Power of the State*

The power of the state over the currency has not necessarily led to the establishment of a monopoly in the creation of money. Up to the eighteenth century, and occasionally even later, there was a constant flow of coins from one territory to another. From the 13th to the 18th century, "the circulating media were distinctly of an international stamp".¹⁵ This was due not only to the "tariffing" by the sovereign of foreign coins, but also to custom, which favored payment in certain foreign coins of good repute, such as the Florentine "florin" or the Venetian "ducat". The international flow of coins was particularly responsive to the needs of many territories which had only an inadequate currency of their own or lacked minting facilities altogether.¹⁶ It is reflected in the mediaeval adage "*una pro alia moneta solvi potest.*"¹⁷ Vestigial evidence is contained in the reference of the Italian

of the Hungarian State (represented by the Emperor) in the bank profits was meant by the court. But as far as the writer knows there is neither in English nor in Continental law any support for the theory that having a participation in the profits of a corporation is a legal ground for bringing a suit on behalf of the corporation. No shareholder would have a right of action in a situation like this, much less a creditor, public or private. See also W. H. Moore, *Act of State in English Law* (1906) 153.

¹³ See the Federal Constitutions of Argentina (1853) art. 67 (10), 108; Australia (1900) art. 51(12, 13), 115; Austria (1934) art. 34(5); Brazil (1891) art. 34(7), 66(2); Canada (1867) sec. 91(14), (15); Germany (1871) art. 4(3); (1919) art. 6(5); Mexico (1917) art. 28, 73(18); Spain (1931) art. 14(12); Switzerland (1874) art. 38, 39; Venezuela (1931) art. 15(12), 78(4). As to the United States see *infra*, sec. 19.

¹⁴ *Woodruff v. Mississippi*, 162 U.S. 291 (1895). The same problem may arise under Mexican law. *Constitucion Política Mexicana* (1917) art. 104.

¹⁵ 1 Sombart, *Der Moderne Kapitalismus* (1921) 409.

¹⁶ Adam Smith, *Wealth of Nations* (1776) book IV, c. 3, part 1, digression.

¹⁷ 2 Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre* (1883) 213; Ascarelli, *La Moneta* (1928) 17.

Commercial Code of 1865 as amended in 1882 to a hypothetical situation of money without "*corso legale o COMMERCIALE*" within the Kingdom.¹⁸

As for private money, it is enough to note that from about 1830 to 1860 considerable numbers of private gold coins circulated in California and other States of the Union.¹⁹ Private metal coins were not prohibited by law until 1864.²⁰ Today, state monopolies probably exist in all civilized countries.

However, in emergency situations statutory prohibition probably will prove ineffective. Governments have frequently tried to force fiduciary money upon the community, making the issue legal tender and providing severe punishment for any repudiation, with such results as attended American Continentals, French assignats,²¹ German marks, and many others. Goods and services may not be obtainable for fiat money. State money may possibly be destroyed by complete depreciation. In this struggle society will in most cases be stronger than the state. Then, too, when, in a period of rapid inflation, a famine of media of payment, especially of small change, occurs, the creation and circulation of private or of

¹⁸ Under this hypothesis the debtor, save for an agreement to the contrary, may pay foreign money debts in Italian currency (Commercial Code, Art. 39); the 1865 Code, Art. 228, had confined the rule to the payment of bills of exchange. There is some controversy about the interpretation of the phrase "*corso commerciale*". The above construction has been set forth particularly by Ascarelli, "*I debiti di moneta estera e l'art. 39 Cod. di Comm.*," *R.D. Comm.* 1923 I 444, and by Scaduto, "*I Debiti Pecuniari e il Deprezzamento Monetario*" (1924) 40, the latter referring to customary circulation of foreign money within border sections. It has become dominant in judicial decisions. See Ascarelli, *La Moneta* (1928) 69, n. 1, giving citations.

¹⁹ Adams, "Private Gold Coins", (1911) 45 *American Journal of Numismatics* 21, 46, 129; (1912) 46 *ibid.* 1, 57, 135, 168; *Adams' Official Premium List of United States Private and Territorial Gold Coins* (1909); *Catalogue of Coins, Tokens and Medals* (U. S. Mint, 1914) 20; White, *Money and Banking* (Rev. Ed., 1935) 34. "Moffat issue", a ten dollar gold coin manufactured by Moffat in California, was particularly popular. In *Chapman v. Cole*, 12 Gray (78 Mass.) 141 (1858), a Moffat coin was held not to be money in Massachusetts. The facts of the case indeed evidence that the coins were not generally known and had not circulated in that section of the country. Under the society doctrine of money there is no difficulty in the hypothesis of a money being recognized and valid, as such, only in a section of the state. See also *infra*, p. 42, n. 37. In the eighteen-thirties private coins, mostly satirizing President Jackson ("hard-time tokens") made their appearance. Low, *Hard Time Tokens* (1899).

²⁰ Act of June 8, 1864, 13 Stat. 120, 18 U.S.C. 281. Private coining is not prohibited by the Constitution.

²¹ See e.g., 1 Palgrave, *Dictionary of Pol. Economy* (1925) 62.

unlawful currency will be inevitable and irresistible.²² If justice is to be done, the authorities must recognize the monetary character of the emergency coins or notes, particularly with respect to payments made with such coins and notes.²³

While ordinarily the state has and exercises full power over the currency, it is ultimately society and custom that decide whether coin and paper will function as, and so be, money. This is no more abnormal a legal proposition than the recognition by the law merchant of instruments made negotiable by custom, a phenomenon very much like the one here discussed.²⁴ The doctrine which makes the notion of money dependent on its circulation is venerable, and can be traced to the middle ages,²⁵ and even to antiquity.²⁶ In modern form

²² Impressive evidence has been gathered by Falkner, "The private issue of token coins", (1901) 16 *Pol. Sci. Q.* 303. He refers to private money issued in England before 1816 (at 309), in France in 1871 and 1872 (at 312), and in the United States during the suspension of specie payments in 1812 and 1837 (at 316) and during the Civil War (at 324), for which period more than 5,000 varieties have been described. See furthermore on "tradesmen's tokens", Feavearyear, *The Pound Sterling* (1931) 157, 192, 296; on clearing house certificates and other private paper money issued during the American crises of 1893 and 1907, Hepburn, *A History of Currency in the United States* (1915) 390. The bronze and aluminum "jetons" (checks or marks) issued by the French Chambers of Commerce during the post-war inflation were apparently issued with governmental authorization; they were protected against forgery by the law of April 29, 1921, D.P. 1923 IV 221, Art. 29. See *Cour de Cassation*, June 25, 1927, D.H. 1927, 435.

²³ See *Thorington v. Smith*, 8 Wall. (75 U.S.) 1 (1869). Clearing house certificates (see n. 22) were held not to be subjected to the 10 per cent death tax on notes used for circulation (*infra*, sec. 8 I), 20 *Op. Att. Gen.* 681 (1893); see also 19 *ibid.* 98 (1888) regarding "ice-notes" issued by ice-companies. In Germany, issuance of emergency money, without consent of the government, was made unlawful by law of July 17, 1922, *supra*, p. 20, n. 30. Yet as early as 1923, during the French occupation of the Ruhr, issuance of unauthorized emergency money was inevitable within the occupied section. Its validity, particularly as to payments, was never in doubt. In the absence of a society theory of money, peculiar justifications were advanced. See Fricke, (1924) 87 *Zeitschrift für das Gesamte Handelsrecht* 399, at 438; *Mitteilungen der Handelskammer Berlin*, 1924, 328. On "obsidional money" issued in France during the Prussian-French war of 1870, see Mater, *Traité Juridique de la Monnaie et du Change* (1925) 57.

²⁴ See Bigelow, *Bills, Notes and Checks* (3d ed., 1928) sec. 29; Norton, *Bills and Notes* (4th ed., 1914) 1-7. "Fungibility" (*supra*, p. 4) also depends on business customs.

²⁵ It was contended as early as the fourteenth century that the validity of monetary changes prescribed by the sovereign depended on the assent of his subjects. The germ of this theory appears in the writings of Thomas Aquinas (thirteenth century). See 2 Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre* (1883) 189; Ascarelli, *La Moneta* (1928) 12; Taeuber, *Molinaeus' Geldschuldlehre* (1928) 27 (note 81), 29. Taeuber describes the method used in the sixteenth century (and probably before) to evade monetary regulations unresponsive to the common valuation of coins. The govern-

it clearly dominates the Anglo-American law,²⁷ whereas the "state theory of money" prevails in German decisions and literature.²⁸ The latter theory, though nominalistic, is opposed to the "society" theory of money vindicated in the preceding pages.

III. *Illegal Currency*

The "society" theory of money acquires particular importance when revolutionary or other illegal agencies are powerful enough to force upon the country or a section of it, revolutionary money of a fiduciary character. Suppose such money is commonly used as the medium of payment in the territories controlled by the revolutionaries; will contracts and payments made in such money be recognized by the law courts of the lawful (i.e., eventually victorious) government?

ments attempted to take measures against the disobedience of the public, e.g., prohibiting the payment for gold coins of a premium over the legal rate; these prohibitions were disregarded; they were not renewed and this gradually resulted in a tolerance of the customary ratio.

²⁸ Aristotle, in a famous passage of his *Ethics* (Book V, c. 5) derives "*νόμισμα*" (money) from "*νόμος*" which means law as well as general convention or custom. However, the words seem to be used here in the latter sense. Whatever the interpretation, Aristotle turns against the theory that things are money by nature, instead of "*νόμος*." Still the interpretation of Aristotle's monetary doctrine is controversial. See recently Taeuber, *Geld und Kredit im Mittelalter* (1933) 305; 1 Gonard, *Histoire des Doctrines Monétaires* (1935) 29, 34.

²⁷ See decisions *supra*, p. 3, n. 13, and *infra*, p. 46, n. 55 and 56.

²⁸ See *Reichsgericht*, Sept. 25, 1919, *R.G.Z.* 96, 262 ("Money is measure of value and medium of payment only by virtue of the command of the state."); July 11, 1924, 58 *Entscheidungen des Reichsgerichts in Strafsachen*, 255 at 256 ("Money includes every medium of payment the value of which is certified by the government or its authorized agent and which is designated for public circulation regardless of its being a legal tender.") However, the *Reichsgericht's* judgment of June 14, 1937, *J.W.* 1937, 2381, although in terms upholding the state theory admits that emergency money, issued by municipalities during the inflation, was real money "nothing being left to the government of the Reich but to tolerate the emission of money substitutes". As to writing, Knapp, *State Theory of Money* stands on similar grounds. Knapp, however, is not consistent, since the state, in his opinion, is only the regular and oldest type of a "payment community", and any other "payment community" may create money of its own (see pp. 39, 40, 95 as compared with p. 148). Surprisingly enough, the "state theory" has been adopted by the National Conference of Commissioners on Uniform State Laws on their 43d Conference (*Handbook of the Nat. Conf.* 1933 p. 160) when they allow a negotiable instrument to be couched in terms of "money authorized by any government" rather than in terms of money current in any country. The phrase "current money" used in the present *Negotiable Instruments Law* (sec. 6(5)) should be construed accordingly. The question does not seem to have been discussed by the commentators of that Law.

The Supreme Court of the United States, in the case of *Thorington v. Smith*,²⁹ involving a contract and payment in confederate currency, answered in the affirmative. The Court treated the question in a moderate spirit, and its language is impressive for its calm and loftiness. It first pointed out that contracts stipulating for payments in confederate, i.e., revolutionary, currency could not, merely for that reason, be regarded as made in aid of the insurrection. "They are transactions in the ordinary course of civil society,³⁰ and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame. . . ." ³¹ The Court went on to show that the contract at bar, though expressly calling for the payment of dollars, without qualifying words, could be interpreted as meaning confederate dollars, dependent upon the circumstances. As a matter of fact, since the confederate dollar had depreciated to zero, validity of the contract would not have helped the creditor very much, had not the Court held that the creditor was entitled to recover in United States dollars the actual value at the time and place of the contract of the confederate dollars contracted for.³² *Bissell v. Heyward*³³ laid down the further rule that the value of the confederate money should be calculated in terms of the (then depreciated) United States dollar, not on a gold or sterling exchange basis which would have further diminished the amount of the debt; and the same test was applied to payments made in confederate currency. Since it would have

²⁹ 8 Wall. (75 U.S.) 1 (1869).

³⁰ In the *Kossuth* case cited *supra*, p. 25, the defendant alleged the note issue of the National Bank of Austria to be unlawful, the Hungarian Parliament not having assented to it. The Court circumvented this point by holding that the notes were *de facto* legal tender. This is, *in ovo*, the society theory of money.

Another type of illegal currency (notes actually circulating, although issued by a bank chartered illegally and for fraudulent purposes) was considered in *Orchard v. Hughes*, 1 Wall. (68 U.S.) 73 (1863), and *Rogers v. Leftwich*, 49 Tenn. 480 (1871). Again using the society theory of money, the courts upheld the validity of payments made in such notes.

³¹ *Thorington v. Smith*, 8 Wall. (75 U.S.) 1 at 12 (1869).

³² Yet the Court did not fail to draw the necessary lines in recognizing the Confederate currency. Thus in *Thomas v. City of Richmond*, 12 Wall. (79 U.S.) 349 (1871), on an action for the recovery of dollar notes issued on Confederate authorization by the City of Richmond, the notes were held void. See Dawson and Cooper, "The effect of inflation on private contracts: United States, 1861-1879", (1935) 33 *Mich. L. Rev.* 706 where much material of a legal and economic nature is carefully analyzed.

³³ 96 U.S. 580 (1878).

been entirely justifiable to consider the confederate money, and therefore the debts, as extinguished by the breakdown of the Confederacy, the rulings of the Court constitute a statesmanlike act of revaluation.

As a matter of fact the problem of illegal currency had appeared as early as colonial times when colonies issued paper money disapproved by the home government, but no cases passing on that problem are known. However, it has revived in another form through the *Alberta Social Credit Legislation* of 1936 and 1937, which purported to create novel circulating media to be based on the "productive capacity of the people of Alberta", each Albertian being entitled to a monthly "consumers' dividend" in such media. This time it was not the home government, but rather the Canadian federal government which opposed the plan as a violation of the Canadian Constitution, and the Alberta enactments were on this ground invalidated by the Supreme Court of Canada.³⁴ Among the numberless monetary phantasmagorias which have been propounded within the last decades the Alberta plan is probably the only one to have been the subject of elaborate judicial discussion.

IV. Penal Law

The social implications of money are also manifest in penal law.³⁵ Since society as a whole is affected by deterioration of the common medium of payment and by the resultant destruction of public confidence, such conduct has at all times been treated as a crime and punished with particular severity. Under the old doctrine of the sovereign's monetary prerogative, monetary crimes were considered to be lese-majesty; under the law of the Roman Empire in Christian times, even

³⁴ *Reference re Alberta Statutes. The Bank Taxation Act; the Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] S.C.R. 100 (Sup. Court of Canada, 1938). *Aff'd* [1938] 3 Western Weekly Rep. 337 (Pr. C., 1938). See also, *infra*, p. 40, n. 24.

³⁵ An excellent and compact discussion of the matter is given by Babelon in 24 *La Grande Encyclopédie* (verb. "monnaie") 145. See furthermore, G. Salvioi, *Il Diritto Monetario Italiano dalla Caduta dell'Impero Romano ai Nostri Giorni* (1889) 74; Liszt, *Lehrbuch des Deutschen Strafrechts* (25th ed., 1927) 732; Ad. Wagner, *Sozialökonomische Theorie des Geldes und Geldwesens* (1909) 550; 15 *Il Digesto Italiano* (1904-1911) 719, art. "Monete (contravvenzioni concernente le)" by G. Guidi; Ascarelli, *La Moneta* (1928) 5 n. See also the interesting criminological study of Rhodes, *The Craft of Forgery* (1934).

as sacrilege;³⁶ and up to the eighteenth century falsifying was avenged with extreme cruelty.³⁷ In England counterfeiting was treated as treason³⁸ and in the United States, Congress declared the counterfeiting of government securities to be a felony punishable by death.³⁹ This penalty was later removed.⁴⁰

³⁶ Pfaff in Pauly-Wissowa, *Realencyclopädie der Classischen Altertums-Wissenschaft*, Second Series, vol. I, art. "Sacrilegium", p. 1680.

³⁷ Babelon (in the article cited *supra*, note 35) tells this story: "Among the numerous trials of counterfeiters in the Middle Ages, records of which have been preserved for us in the public archives, certainly one of the most moving is that of the goldsmith Louis Secretain, condemned at Tours, 1486, to be boiled and hanged after having been convicted of the crime of counterfeiting. On the day of the punishment, Secretain was led from the prison to Foire-le-Roi Square, in Tours, where a huge caldron filled with water had been set upon a blazing fire. The unfortunate one was bound by the executioner and thrown into the caldron; but the water had not yet reached the boiling point and in his struggles the victim disengaged himself from his fetters. He reappeared on the surface of the water holding out to the crowd, which was speechless with pity, his suppliant arms and crying out 'Jesus! Mercy!' The executioner armed with an iron fork, smote him on the head several times to make him sink again to the bottom of the vat. The crowd and the judges, themselves exasperated, cried at last: 'Death to the executioner!' An affray ensued in which the executioner was killed and Secretain rescued. The half-cooked unfortunate one was carried into a neighboring church where he found refuge until the king's pardon was brought at last, returning him his freedom." (Citing Carré de Busserolle, *Les Usages Singuliers de Touraine*, "Le supplice des faux monnayeurs" (Tours, 1884) at 8.) Mention may also be made of a North Carolina Act which empowered "any person whatever to kill and destroy" counterfeiters who would not surrender within a limited time given for such surrender. Repeal of the Act was recommended, in 1766, by the Privy Council, 5 *Acts of the Privy Council of England*, Colonial Series (1912) 38.

³⁸ *Treason Act, 1551* (25 Edw. 3, stat. 5, c. 2), 4 Halsbury, *Statutes of England* (1929) 273; and *supra*, p. 2, n. 10. For the present English law see *Coinage Offences Act, 1936*, 26 Geo. V and 1 Edw. VIII c. 16 and as to bank notes *Forgery Act, 1913*, 3 & 4 Geo. V c. 27, 4 Halsbury, *Statutes of England* 787 and the Act of 1935 cited *infra*, p. 35, n. 51.

³⁹ Act of April 30, 1790, sec. 14, 1 Stat. 112.

⁴⁰ Act of March 3, 1825, sec. 17, 4 Stat. 115. The pertinent federal enactments, now in force, are found in the *Federal Criminal Code*, 18 U.S.C., ch. 7 (secs. 261-293) of which is concerned with offenses against currency, coinage, etc. They are expressly authorized by art. I, sec. 8 (6) of the federal constitution. Passing of counterfeit may also be punished by the states, *Fox v. State of Ohio*, 5 How. (12 U.S.) 410 at 433 (1847); *Ex parte Geisler*, 50 Fed. 411 (C.C. N.D. Tex., 1882); *Keyes v. State*, 166 Miss. 316, 148 So. 361 (1933). (The *New York Penal Law*, sec. 894, is an instance.)

Surprisingly enough, a number of American courts in recent times are not sufficiently aware of the dangers of counterfeiting and are lax in punishing it, a situation which has probably contributed to an increase in this crime. U. S. Treasury Dept., *Fines and Imprisonments in Counterfeiting Cases* (1935).

The monetary crimes today, as formerly, include not only illegal fabrication and alteration of coin, but also minor offenses such as melting down or exporting coin in violation of the law,⁴¹ dealing with coin, especially gold coin, above its legal value,⁴² and refusing to receive coins bearing the image of legal coins, the latter case being particularly suggestive of lese-majesty.⁴³ At certain periods in history, even refusal of paper money has been made a capital crime.⁴⁴ The more arbitrary the monetary fiat, the more cohesive will the resistance of society be. If the sovereign then adopts the weapon of extreme punishment, the courts more responsive to social pressures may counter with a restrictive interpretation.

Another significant feature of monetary penal law is its tendency towards internationalism. To begin with, each state is interested in combatting the counterfeiting of the money of other states since counterfeited foreign currency may be used within its own territory. All the Penal Codes therefore make counterfeiting foreign money a criminal offense, although possibly under less severe penalties than those provided for counterfeiting the national money.⁴⁵ Furthermore

⁴¹ As to exporting: England from 1299-1663, for a time under death penalty, Feavearyear, *The Pound Sterling* (1931) 3; various American colonies at the end of the 17th century, Nettels, *The Money Supply of the American Colonies* (1934) 231; on Italian legislation (15th-18th century) Salvioli, cited *supra*, p. 31, n. 35, and generally, Babelon, cited *ibid.*

⁴² See 5 & 6 Edw. VI, c. 19 (1552), interpreted as not covering an exchange above legal value of gold coin for banknotes in *The King v. De Yonge*, 14 East 402, 104 Eng. Rep. 657 (1811). See Feavearyear, *The Pound Sterling* (1931) 187. This statute was supplemented, however, by Act of July 24, 1811, 51 Geo. III, c. 127 and subsequently repealed by 2 & 3 Will. IV, c. 34 (1832). The 1552 act was forgotten, it seems, at the end of the 17th century. *Infra*, sec. 27, n. 1. As to Italian Law, cf. Salvioli, cited *supra*, p. 31, n. 35. The rule has been restored in many countries, e.g., in France, Laws of Feb. 12, 1918, D.P. 1916 IV 323 and Oct. 16, 1919, D.P. 1920 IV 272, and in Germany, decree of Nov. 23, 1914, R.G.Bl. 1914, 481.

⁴³ This conception (refusal of lawful English money as "contempt", (namely, of the Crown) also appears in the *Mixed Money Case*, *supra*, p. 24, n. 3.

⁴⁴ See *infra*, p. 39.

⁴⁵ See 35 Stat. 1117 (1909), 18 U.S.C. 270-275, 284; 25 and 26 Geo. V c. 25 (1935); 26 Geo. V and I Edw. VIII c. 16 sec. 17(b) (1936); French Penal Code 132 *et seq.* (see also *infra*, sec. 14, n. 8); German Penal Code 146 *et seq.*; Italian Penal Code of 1931, sec. 453 *et seq.*; U.S. S.R. Penal Code of 1926, sec. 59(8). The latter provision making counterfeiting of foreign as well as domestic money a capital offense is remarkable because as a rule the U.S.S.R. affords little protection to foreign interests. See Harvard, "Draft Convention on jurisdiction with respect to crimes", art. 8, (1935) 29 *Am. Journ. of Intern. Law* (Supp.) 561 at 562.

account is taken of the fact that counterfeiting bands operate from country to country and frequently shift the center of their activities, by making monetary crimes committed abroad punishable, even though in accordance with the "territoriality" principle of penal law, foreign crimes are not in general punishable under the national law.⁴⁶

The tendency for repressive legislation to pass the national boundaries has even caused repercussions in the field of international law. In *United States v. Arjona*, the Supreme Court took it to be an international obligation of sovereign states to enact provisions against the counterfeiting of foreign money since disturbances of monetary circulation might affect international commercial intercourse.⁴⁷ The court's theory, based primarily on Vattel (1714-1767), is hardly sufficiently documented. Yet the efficient curbing of counterfeiting certainly requires international cooperation as a matter of expediency. Such cooperation was inaugurated in 1929, under the auspices of the League of Nations, by the "*International Convention for the Suppression of Counterfeiting of Currency*".⁴⁸ The Convention obligates the signatory powers to punish the fraudulent making or altering of currency, whether domestic or foreign, to establish central agencies for the investigation of counterfeiting, to exchange pertinent information and to extradite counterfeiters in case they cannot be prosecuted by the extraditing state because of the territoriality principle. Counterfeiters actuated by political motives are not exempt; in fact it was one of the main concerns of some of the signatory governments to deprive counterfeiters under all circumstances of the privileges accorded to political offenders.⁴⁹ The Convention has been ratified by 25 states,

⁴⁶ German Penal Code, 4 par. 2(1); French Code of Criminal Procedure 7 (limited to counterfeiting of French money); Italian Penal Code of 1931, sec. 7(2). See also Harvard "Draft Convention on jurisdiction with regard to crimes", art. 8, (1935) 29 *Am. Journ. Int. Law (Supp.)* 561.

⁴⁷ 120 U.S. 479 (1887).

⁴⁸ League of Nations, (1931) 112 *Treaty Series* 372. The Proceedings of the International Conference for the adoption of this convention are published in League of Nations, C. 328 M 114; 1929 II 48. For comments see Fitz-Maurice "Convention for the suppression of counterfeiting currency" (1932) 26 *Am. Journ. Int. Law* 533 and, somewhat scanty, Pella, "La coopération des Etats dans la lutte contre le faux monnayage", (1927) 34 *Revue Générale du Droit International Public* 673.

⁴⁹ In 1925, a gang, headed by one Prince Windischgraetz and including a number of other members of Hungarian society, had counterfeited French franc notes on a large scale. Before the Hungarian Court

among them Germany, Italy, the Netherlands, Poland, U. S. S. R.,⁵⁰ but not by the United States, Great Britain or France. Great Britain, however, has incorporated the basic rules of the Convention into her national law.⁵¹

V. Law of Money—Public or Private Law?

Does monetary law form part of public or of private law? The question is of much more interest to continental than to Anglo-American jurists. In continental law, ordinary law courts as a rule have jurisdiction only in private law cases; statutory rules frequently employ the terminology "private law" ("civil law", "*droit privé*", "*Bürgerliches Recht*") and "public law", and there is an elaborate differentiation between the two fields. The German *Reichsgericht*, in colonial legal tender cases, held that the law of money is public law and hence, under German colonial law, not applicable to the former German colonies.⁵² However, since the rules relating to money are scattered over the various fields of law—contract, administrative, constitutional, criminal, procedural, international law, etc.—an absolute classification seems inappropriate. The nature of the individual rule concerned should be

they asserted that their motive was to seek revenge upon France for the Peace of Trianon, by spoiling the French monetary system. *The Times* of May 22, 1926, p. 11 and Lippert, *Internationales Finanzrecht* (2d ed., 1928) 800. The lenient attitude of the Hungarian government towards the counterfeiters seems to have prompted the French government to start the Geneva conference. This was done by a letter of Mr. Briand to the Secretary General of the League of Nations, Proceedings cited n. 48, *supra*, at p. 219, and Fitz-Maurice, cited *ibid.*, at p. 535. However, except for warfare (*infra*, sec. 14 II) the importance of political counterfeiting seems to have been greatly overrated. There was no real counterfeiting in the Kossuth case, *supra*, p. 25. It may be mentioned, however, that an Austrian decree of April 27, 1854, declared it to be high treason to acquire or possess Mazzini lots, Kossuth-dollar notes, and other currency of revolutionary propaganda. (Austrian) *Reichsgesetzblatt* 1854, 397.

⁵⁰ *League of Nations Publications* (Legal) A 6(a) 1937 Annex 1, p. 68, giving a list as of August 31, 1937.

⁵¹ *Counterfeit Currency (Convention) Act, 1935*, 25 & 26 Geo. V, c. 25, superseded as to coins by the *Coinage Offenses Act, 1936*, *supra*, p. 32, n. 38. The 1935 Act deviates from the traditional English terminology in that it includes "forging" of notes in "counterfeiting", the traditional terminology being perhaps influenced by the theory that bank notes are not money. *Infra*, p. 76.

⁵² Judgment of Nov. 28, 1923, *R.G.Z.* 107, 78. Same doctrine: Scaduto, *I Debiti Pecuniari* (1924) 51; *Contra*: E. Jung, *Das Privatrechtliche Wesen des Geldes* (1926) (stressing the private law character of money).

examined.⁵³ The question of the extent to which a creditor is under a duty to take "legal tender" in payment is undoubtedly one of private law, contrary to the opinion of the *Reichsgericht*. The endowment of coins or notes with the character of legal tender is, however, an act of sovereignty, hence of public law, as was held by the Supreme Court of the United States in *Ling Su Fan v. United States*,⁵⁴ as it happens, also a colonial case touching legal tender. The implications of the Court's doctrine are not, however, particularly important. The Court is merely concerned with the application of the due process clause, taken over from the American Constitution into the organic law of the Philippine Islands. The Court considers the question whether under the due process clause, a prohibition to export coins constitutes a measure reasonably adapted to a permissible end. In this connection, the point is made that the creation of legal tender, as well as the limitation upon its use involved in the export prohibition before the Court, lies within the domain of public law, since, as is said elsewhere in the opinion, the limitation may be required by public policy. Although the idea of the Court is clear enough, the word "public law" does not seem to be used in a strictly technical sense, and certainly not in the sense of the continental concept of public law.

Generally speaking, the concept of "public law" in Anglo-American jurisprudence has no great practical significance; but is rather employed for purposes of literary and pedagogical classification. Even in the latter uses, its scope and meaning are doubtful.⁵⁵

⁵³ The Supreme Court of Bavaria, Oct. 15, 1930, "*Die Deutsche Rechtsprechung auf dem Gebiet des Intern. Privatrechts in Jahre 1931*" 68, referring to the present writer's former publications, admits that monetary law regulating the discharge of debts is "private" in character.

⁵⁴ 218 U.S. 302 (1910).

⁵⁵ See Pollock, *A First Book of Jurisprudence* (4th ed., 1918) 95; Holland, *The Elements of Jurisprudence* (13th ed., 1924) 128; Salmond, *Jurisprudence* (8th ed., 1930) 73.

SECTION 4

LEGAL TENDER

I. Significance of "Legal Tender"

Legal tender¹ is money which a creditor has no privilege to refuse if tendered by a debtor in payment of his debt. When legal tender is not accepted by the creditor, the debtor who is ready and willing to perform his obligation may, when sued by the creditor, pay the money into court and have judgment for costs. The payment operates as a discharge of the debt.² Moreover, a simple tender automatically discharges security,³ and in some American jurisdictions will release the debtor from payment of further interest and costs.⁴ In equity it may be a basis of further relief;⁵ specifically, a tender of money is equivalent to payment for purposes of satisfying the conditions precedent to specific performance.⁶

Unlike the common law, the Roman law did not, originally, treat tender from the remedial point of view; it assimilated "*mora creditoris*" to "*mora debitoris*" (the approximate meaning of *mora* being delay). The *mora* of either creditor or debtor altered the rights and obligations of the parties. Originally the debtor, in case of "*mora creditoris*", was held justified in ridding himself of the object owed even by throw-

¹ For an able historical discussion of Anglo-American law, see Breckinridge, *Legal Tender* (1903). A tremendous number of American cases is compiled in Hunt, *A Treatise on the Law of Tender* (1903).

² 6 Williston, *Contracts* (Rev. ed., 1938) sec. 1809.

³ *Moore v. Norman*, 43 Minn. 428, 45 N.W. 857 (1890) [tender, without more, discharges a chattel mortgage even when made after the debt is due]; 6 Williston, *Contracts* (Rev. ed., 1938) sec. 1817. But where the security is in the form of a real estate mortgage, differences arise. Some states, adhering to the common-law theory of mortgages, permit a tender on the law day to discharge the lien, but, where tender is made after the law day, refuse this effect on the theory that full title has already vested in the mortgagee. *Debnam v. Watkins*, 178 N.C. 238, 100 S.E. 336 (1919); cf. *Depon v. Shawye*, 263 Mass. 206, 161 N.E. 243 (1928). Others, employing the lien theory of mortgages, generally hold that a tender at any time before foreclosure will extinguish the mortgage lien. *Kortright v. Cady*, 21 N.Y. 343 (1860). For a complete collection of cases, see "Unaccepted tender as affecting lien of real estate mortgage" (1934) 93 A.L.R. 12.

⁴ 6 Williston, *Contracts* (Rev. ed., 1938) sec. 1817.

⁵ 5 Pomeroy, *Equity Jurisprudence* (2d ed., 1919) sec. 2110.

⁶ Pomeroy, *Specific Performance of Contracts* (3rd ed., 1926) sec.

ing it away, but this was changed in Roman law into a right of the debtor to deposit the object at the creditor's cost.⁷ The notion of "*mora creditoris*" has been adopted by the German, Austrian and Swiss Codes,⁸ and it turns up occasionally in Anglo-American law.⁹ The justification for the idea is, however, highly debatable, since the creditor, in failing to accept the payment due, merely refrains from exercising his right, but does not violate an obligation. Therefore he cannot be held liable for damages, at least under ordinary circumstances. Nevertheless, the Code solutions seem to be sound from a practical standpoint, in making a tender of the amount due operate to stop interest and to shift risks to the creditor; even tender by words will sometimes suffice for this purpose.¹⁰ The French and the Italian Codes do not employ the "*mora creditoris*" device, but permit the debtor to offer the sum due the creditor through a sheriff or notary ("*offre réelle*") and upon the refusal of the creditor to accept it, to deposit it with a governmental agency provided for that purpose ("*consignation*", "*deposito*"); the consequence of the deposit is to discharge the debt.¹¹ The somewhat cumbersome requirements as to tender developed by the common law are unknown to civil law. In particular, there is nothing corresponding to the common law rule which requires the debtor to "keep tender good", that is, after tender, to keep the tendered sum ready for the creditor and not to profit from it, "continuance of the offer" being a necessary part of the plea of a debtor seeking to avail himself of the tender defense.¹²

Both systems agree in not placing the creditor under a duty to give change if the debtor makes a legal tender of more than the amount of the debt.¹³ An exception has been

⁷ Girard, *Manuel Élémentaire de Droit Romain* (8th ed. by Senn, 1929) 692.

⁸ German Civil Code 293 *et seq.*; Austrian Civil Code 1419; Swiss Law of Obligations 91 *et seq.*

⁹ *Comings v. Powell*, 97 Vt. 286, 122 Atl. 591 (1923).

¹⁰ German Civil Code 294, 295, 300, 301. The Austrian and Swiss rules are not as elaborate.

¹¹ French Civil Code 1257 *et seq.*; Italian Civil Code 1259.

¹² *Roosevelt v. Bull's Head Bank*, 45 Barb. (N.Y. S. Ct.) 579 (1866); see *Bissel v. Heyward*, 96 U.S. 580 (1878). However, in order to discharge a security, the tender need not be kept ready. See cases cited *supra*, n. 3.

¹³ *Perkins v. Beck*, Fed. Cas., No. 10,984 (C.C.D.C., 1830); 6 Williston, *Contracts* (Rev. ed., 1938) sec. 1810; 5 Page, *Law of Contracts* (2d ed., 1921) sec. 2865. Although frequently cited in support of this proposition, *Betterbee v. Davis*, 3 Camp. 70, 170 Eng. Rep. 1309 (1811),

duly admitted by American courts to the effect that railways in selling their tickets should be prepared to give change within reasonable limits.¹⁴ This obligation is obviously grounded on the universally imposed obligation of common carriers to accept goods and passengers for carriage and would seem to be in harmony with foreign law.

Severe penalties have frequently been provided for the non-acceptance of legal tender. From Marco Polo we learn that, in the 13th century, Chinese law made rejection of imperial paper money punishable by death;¹⁵ and twenty years in chains or, in some cases, death, was the penalty provided for the refusal to accept French *assignats*.¹⁶ At the time of the American Revolution, non-acceptance of Continental notes was treated as an enemy act and sometimes worked a forfeiture of the debt.¹⁷ The Latin Codes still preserve, although in a very attenuated form, penalties for the non-acceptance of legal tender.¹⁸ Such provisions have not existed in Anglo-American or in Central European law at least since the nineteenth century. Indeed, a creditor who does not take legal tender harms himself, since he is not entitled to anything else; it is not very sensible to force upon him, under penalty, a performance he does not want. The compulsion, however,

would not seem to be directly in point, inasmuch as bank bills were not, at the time of decision, legal tender. See *infra*, p. 45.

¹⁴ *Barrett v. Market Street Ry.*, 81 Cal. 296, 22 Pac. 859 (1889) (tender of a \$5 gold piece held reasonable, especially where it was practically the lowest circulating gold coin in California); *Jones v. Louisville & N. E. Ry.*, 109 Miss. 655, 68 So. 924 (1915) (where passenger tendered steam railway conductor a \$100 bill with request that change be delivered only after they reached destination in large city; held that it was a jury question if the amount tendered was reasonable). Cf. *Barker v. Central Park, etc., R. R.*, 151 N.Y. 237, 45 N.E. 550 (1896) (a tender of a \$5 bill in payment of a 5 cent fare may be refused as an unreasonable tender). Apparently the duty to furnish change is not placed upon telegraph companies. *Dale v. Western Union Telegraph Co.*, 181 App. Div. 292, 168 N.Y. Supp. 783 (1918).

¹⁵ 1 Yule, *The Book of Ser Marco Polo* (3d ed., 1903) 423.

¹⁶ Decrees of August 1 and September 5, 1793, 6 Duvergier, *Collection des Lois* 80 and 181.

¹⁷ See Bullock, *Monetary History of the United States* (1900) 66; Hepburn, *A History of Currency in the United States* (1915) 14. There were colonial precedents for forfeiture because of non-acceptance of legal tender. Nettels, *The Money Supply of the American Colonies before 1720* (1934) 265.

¹⁸ French Penal Code 475 (11); Italian Penal Code 693; Spanish Penal Code 592. The French *Cour de Cassation*, July 13, 1860, D.P. 1860 I 418, held a creditor liable to punishment who had refused to receive only copper coins for his debt of 1 franc, 25 centimes (legal maximum: 5 fr.). This is obviously unsatisfactory.

takes on a new aspect when it is coupled with maximum prices which invariably make their appearance in emergency periods.¹⁹

These possible penal implications are illustrative of the fact that the subject of legal tender is not exclusively part of the law of contracts, as has been recently reasserted.²⁰ Certainly contracts calling for payment of money are affected by the regulation of legal tender. But legal tender is at the same time an attribute of money and has been considered, as pointed out above, a subject matter of "public law". At any rate, in legislation legal tender is generally associated with money rather than with contracts. Thus the German Reich, a federation, did not hesitate in 1871²¹ to create and invest new kinds of gold coins with the force of legal tender, even though, under the constitution of 1871, the federal government had no legislative power over contracts.²² The Supreme Court of the United States, therefore, expressed the universal view when it held the authority to determine legal tender to be a component element of currency power.²³ The exclusive legal tender power of national governments even operates as a check upon monetary excesses of subordinate governments.²⁴

The term "legal tender" is fortunate, inasmuch as it does not suggest the idea of payment, but stresses the significance of the one-sided act of the debtor. It is superior to the German term "lawful medium of payment" ("*gesetzliches Zahlungsmittel*")²⁵ as well as to the French "*cours légal*" or

¹⁹ See, for instance, as to the French Revolution, White, *Fiat Money Inflation in France* (1933) 40; *Revue de Droit Bancaire* 1923, 267; as to the American Revolutionary War, Bullock, *op. cit.*, at 66, and Hepburn, *op. cit.*, at 16. Rhode Island enacted such a law as late as 1786. Varnum, *The Case of Trevett v. Weeden* (1786); 2 Chandler, *American Criminal Trials* (1844) 267 at 277.

²⁰ Jerome, *Governments and Money* (1935) 177.

²¹ Law of Dec. 4, 1871, *R.G.Bl.* 1871, 404.

²² The Reich was not given legislative power over "civil law", including the law of contracts, until 1873.

²³ In the *Legal Tender* cases, *Knox v. Lee* and *Parker v. Davis*, 12 Wall. (79 U.S.) 457 (1871).

²⁴ The *Alberta Social Credit* legislation of 1936 and 1937, discussed *supra*, p. 31, in providing for provincial circulating media, had carefully avoided declaring them legal tender which under the Canadian constitution can be done only by the federal government. An analogous situation resulted from the constitutional relations of the American Colonies to the Home government, *infra*, sec. 15 IV.

²⁵ This is the term used in statutory language. See, e.g., *Bankgesetz* of August 30, 1924, sec. 3 par. 2, *R.G.Bl.* 1924 II 235; *Münzgesetz* of August 30, 1924, sec. 4, *ibid.* 1924 II 254. Writers sometimes employ other expressions such as "*Währung*" (used particularly by earlier writers), "*Währungsgeld*", "*aufdrängbares Geld*", "*zwangsläufiges Geld*".

Italian "*corso legale*".²⁶ Circulating money which is not legal tender is apparently nevertheless a "lawful" medium of payment, inasmuch as the law does not oppose and may even favor the use of such money in payments.²⁷ The circulation ("*cours*") of such money is therefore also "legal" undoubtedly.

American legislation sometimes uses the term "lawful money" in lieu of "legal tender".²⁸ This term, an inheritance from colonial times,²⁹ is from a logical point of view unfortunate as are the French and German terms, since lawful money, in the original sense of the word, may lack legal tender effect. A curious controversy is connected with the term "lawful money". Under the National Banking Act, "lawful money" must be deposited with the United States Treasury for the redemption of national banknotes.³⁰ It was contended at times by the inflationists that coins were not included in "lawful money", and it needed several opinions, rendered at the request of the Secretary of the Treasury, by the Attorney General³¹ to destroy this caricature of nominalism, which is of interest as being the very antithesis of the hard-money doctrine.

The phrase "*cours forcé*" (*Zwangskurs, corso forzoso*) has a special meaning. It signifies the legal tender effect of inconvertible paper money. This term therefore contains two elements, (1) the legal tender rule, regarding the payor-payee relationship, (2) the inconvertibility rule, regarding the relationship between the signer and the holder of the note. The term is particularly popular in French writings³² and its use

²⁶ This nomenclature is now well settled in judicial and literary language, but statutory terminology is vacillating. *Infra*, n. 32. The term "*corso legale*" is used in the Italian Commercial Code, art. 39.

²⁷ *Infra*, p. 43, at n. 39 and 40. German legislation therefore was compelled to distinguish "*gesetzlich zugelassene Zahlungsmittel*" (legally permitted media of payment; see decree of April 23, 1938 R.G.Bl. 1938 I 405 sec. 2) from "*gesetzliche Zahlungsmittel*", an obviously undesirable nomenclature.

²⁸ See, e.g., 12 U.S.C. 121, 123, 131 (National Bank Notes); 441, 443, 445 (Notes of the Federal Reserve System); and 31 U.S.C. 337, 338 (exchange of subsidiary and minor coin).

²⁹ *Infra*, sec. 15 III.

³⁰ 12 U.S.C. 121.

³¹ 17 *Op. Att. Gen.* 121 and 144 (1881). The statement of the legal situation in Hepburn, *A History of Currency in the United States* (1915) 326 is not entirely accurate.

³² In statutory language there is still uncertainty as to the use of the terms "*cours forcé*" and "*cours légal*". See, Mater, *Traité Juridique de la Monnaie et du Change* (1925) 82; Gény, "*Cours légal et cours forcé*", *Revue Trimestrielle de Droit Civil* 1928, 1.

is sometimes convenient. Seen from a legal viewpoint, however, it lacks accuracy in that *legal tender as such* brings about a compulsory circulation of the legal tender medium.³³ Moreover, the merger of two separate legal concepts into one term has necessarily served to confuse monetary theory.³⁴

II. Qualifications of Legal Tender—Public Receivability

The legal tender quality affects everybody to whom money is owed, private individual or government. Exceptions to this rule touch payments to the government. For example, it is frequently required that customs dues be paid in gold³⁵ in order to assure a gold influx. This is doubly advantageous under a compulsory regime of paper money, since internal circulation is not affected at all. Again, there is the generally effective rule that certain kinds of small coin ("subsidiary coin", "*Scheidemünze*") shall be legal tender only in limited amounts fixed by law.³⁶ A third and infrequent kind of exception consists in territorial restrictions upon legal tender.³⁷

³³ This is the reason why "*cours forcé*" and "*cours légal*" were sometimes interchanged, as by the *Cour de Cassation*, March 29, 1890, *Sirey* 1890 I 137 at 138, with critical annotation by Villey; the accurate distinction appears in the judgment of the same Court, May 5, 1892, *D.P.* 1892 I 580.

³⁴ *Infra*, p. 52, and sec. 28 at n. 36 and 37.

³⁵ See e.g., 12 Stat. 710 (1863) sec. 3, 31 U.S.C. 452 (United States notes legal tender "except for duties on imports and interest on the public debt"). Same, as to customs, 13 Stat. 106 sec. 23 (1864), 12 U.S.C. 109 (national bank notes). Similarly, under Italian law, customs could not be paid in Italian banknotes. Scaduto, *I Debiti Pecuniari* (1924) 62 n. 30. Austria, likewise, for a long time required payment of customs in gold coin. Helfferich, *Das Geld* (6th ed., 1923) 349. Those exceptions no longer exist. As to the United States, see *infra*, p. 48, n. 66.

³⁶ See, e.g., 21 Stat. 8 (1879) sec. 3, 31 U.S.C. 459; subsidiary silver coins limited to \$10: 17 Stat. 427 (1873), 31 U.S.C. 460; minor coins limited to 25 cents. The coins are now unlimited legal tender, *infra*, p. 48. See also the *English Coinage Act, 1870*, 33 and 34 Vict., c. 10, sec. 4.

³⁷ The notes of the Bank of England of £5 and upwards are not legal tender in Scotland. Act of July 21, 1845, 8 & 9 Vict., c. 38; *Currency and Bank Notes Act, 1928*, 18 & 19 Geo. V., c. 13; see also Feavearyear, *The Pound Sterling* (1931) 328. In Italy the notes of certain banks of issue were legal tender only within definite sections of the country. Royal Decree of April 28, 1910 No. 204, *Raccolta Ufficiale* 1910 I 753. These notes have now been withdrawn. Greco, *Corso di Diritto Bancario* (2d ed., 1926) sec. 158. For other cases of territorial limitation, see *Reichsgericht*, Dec. 8, 1930, *R.G.Z.* 131, 41, and Nussbaum, *Das Geld* (1925) 47 (former German colonies). In this connection mention may be made of the ship money orders which are issued for each individual voyage by the German trans-oceanic steamship companies as a medium of payment to be made on board. They are drawn on the

Certain types of legal tender may also be excluded from use in payment by special agreement of the parties.³⁸

Legal tender operates through the requirement that creditors shall receive the medium of payment designated as legal tender in discharge of debts owing to them. When only the Government is burdened with the obligation to accept a designated medium of payment in discharge, that medium is not legal tender. It can better be characterized as having "public receivability", a term having congeners in American legislation.³⁹ It seems to be peculiar to American law that "public receivability" appears under a reciprocal aspect, that is, the obligation of the government to receive a particular kind of money and the right of the government to require its creditors to take such money in discharge of its debts to them.⁴⁰

line which redeems them only on German soil. Passengers may buy them in return for marks, or, at a discount, for foreign money. These money orders are a result of the German monetary import and export regulations, and serve to prevent evasions of the latter. *E.g.*, a west-bound passenger cannot have his German marks, by way of remittance, paid out in cash on board ship. In fact, this ship money is the principal circulating medium on the steamer; it is not legal tender but constitutes, at most, refusable money with a particularly small area of circulation.

³⁸ The most frequent agreement of this type purports to exclude paper money from use in payment to be made in discharge of the debt. These "gold" (or "silver") clauses have generally been held good, *infra*, sec. 18 at n. 37, and sec. 28 III. As to silver dollars the law in terms provided that they shall be legal tender "except where otherwise expressly stipulated in the contract", Act of Feb. 28, 1878, sec. 1, 20 Stat. 25, 31 U.S.C. 458.

³⁹ See, *e.g.*, Act of Dec. 23, 1913, sec. 16, 38 Stat. 251 at 265, 12 U.S.C. 411 (Federal Reserve notes shall be receivable by all national and member banks and Federal Reserve Banks and for all taxes, customs, and other public dues). The banks mentioned may be considered agencies of the government regarding currency administration.

Silver certificates were given likewise public receivability. Act of Feb. 28, 1878, sec. 3, 20 Stat. 25 at 26; March 3, 1887, 24 Stat. 509 at 515, 31 U.S.C. 405; but this was not sufficient to make them "lawful money" in the sense indicated above. 20 *Op. Att. Gen.* 725 (1894). At present the notes and certificates are unlimited legal tender. 48 Stat. 112 (1933), 31 U.S.C. 462. The notes of the first and second Banks of the United States were likewise vested with public receivability. Act of Feb. 25, 1791, sec. 10, 1 Stat. 191 at 196; Act of April 10, 1816, sec. 14, 3 Stat. 266 at 274. The German term for public receivability is "*Kassenkurs*". See Nussbaum, *Das Geld* (1925) 24, where some German instances are indicated.

⁴⁰ 41 Stat. 387 (1920), 12 U.S.C. 109, regarding national bank notes (reciprocal receivability subject to certain exceptions). This type of receivability goes back to the "commodity money" of early colonial times. Nettels, *The Money Supply of the American Colonies before 1780* (1934) 209.

In the terminology of Hohfeld,⁴¹ legal tender and public receivability create in the holder of money having either characteristic a "power", conditional on his becoming a debtor. On becoming a debtor, he may change his legal relations with the creditor to the detriment of the latter by tender and so subject the creditor to a legal "liability". This power is obviously not a chose in action such as is embodied in a redeemable bank note; it is not a "right" in Hohfeld's sense. For this reason there is no justification for Knapp's theory that paper money, receivable by the government or other "central agency", necessarily implies a conditional debt owed by such agency to the holder.⁴²

III. Historical Development of Legal Tender

The development of the legal tender concept is a comparatively recent phenomenon. In general, up to the eighteenth century lawful money could be used in discharge of debts as a matter of course; proclamation of a novel coin by the sovereign meant compulsion upon his subjects to receive it for the prescribed value.⁴³ The bank notes of England and France⁴⁴ appear to have been the first European instance of a circulating medium which was not legal tender. In the American colonies the legal tender concept developed even earlier. Apart from the fact that during the seventeenth and eighteenth century certain commodities were vested with the quality of legal tender, in 1690 Massachusetts issued "bills of credit" which, while at first possessing only public receivability, were in 1692 made legal tender, an example followed by other colonies until those issues were forbidden by the home government.⁴⁵

⁴¹ Hohfeld, *Fundamental Legal Conceptions* (1934) 36, 50.

⁴² Knapp, *The State Theory of Money* (1924) 154.

⁴³ The guinea is an exception. First coined in 1664, it did not become legal tender until 1717. Holt, C.J., in *Pope v. St. Leiger*, 5 Mod. 1 at 7, 87 Eng. Rep. 481 (1695/1696) admitting that "there was no proclamation to make them [the guineas] pass" held they were a "current coin of the kingdom". See also *Dixon v. Willows*, 3 Salk. 239, 91 Eng. Rep. 800 (1696).

⁴⁴ The notes of John Law's "*Banque Générale*", founded in 1716, were not legal tender; but the bank having been transformed, in 1718, into a "*Royal Bank*" the notes of the latter were given this privilege. Van Dillen, *History of the Principal Public Banks* (The Hague, 1934) 282 (contribution of Mr. Paul Harsin on *La Banque et le Système de Law*).

⁴⁵ See *infra*, sec. 15 IV.

While the legal tender experiment with paper money (colonial "bills of credit", John Law's adventure, Continentals, *assignats*) turned out disastrously, as is well known, the notes of the Bank of England, without being legal tender, gained a high reputation during the same period. This led governments, from the close of the eighteenth century, to be markedly hesitant in impressing bank notes with legal tender quality; it was the convenient redemption of the note and the soundness of the bank's financial policy which induced people to receive the notes in payment. After being compelled, in the course of the Napoleonic wars, to suspend cash payments on the notes of the Bank of England, the English government caused an act to be passed in 1812, by which sheriffs enforcing the order of a court for the payment of money, were required to accept payment for the judgment creditor in bank notes.⁴⁶ This meant that a creditor who would enforce payment had to accept notes despite the fact that the notes could not be pressed upon him out of court. If the creditor preferred to wait until resumption of cash payments by the bank (which occurred in 1821) he would be entitled to gold. The effect of the Act was very similar to that of legal tender provisions, but at least appearances were preserved.⁴⁷ In 1833 the notes were made legal tender for as long as the bank should maintain their convertibility.⁴⁸ This formula, which met the main objection urged against legal tender notes, was

⁴⁶ 52 Geo. III, c. 50 (1812); passed for one year and continued by 53 Geo. III, c. 5 (1812) and 54 Geo. III, c. 52 (1814). As early as 37 Geo. III, c. 45 (1797), a debtor tendering bank notes was to be discharged of arrest. In *Grigby v. Oakes*, 2 Bos. & P. 526, 126 Eng. Rep. 1420 (C.P., 1801), a creditor's claim for coin was allowed, Lord Alvanley, Ch. J., remarking (at 528), "Thank God few such creditors as the present Plaintiff have been found since the passing of the act!" This indicates the social operation of the act, which was certainly further strengthened by the condemnatory utterance of the Chief Justice. In *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Pet. (36 U.S.) 257 (1837), it is mentioned that under an act of the Kentucky legislature it was required that the notes of the defendant bank should be received on all executions by the plaintiffs and that if the latter would not accept the notes, further proceedings were to be delayed for two years. The method is similar to the English one of 1812, but the objective was rather to evade the Constitutional provision which prohibits states from "[making] anything but gold and silver coin a tender in payment of debts". Art. I, sec. 10. For a modern reappearance of this strange scheme in the Norwegian gold clause legislation of 1923, see *infra*, sec. 29 at n. 17.

⁴⁷ That this experience aroused a certain distrust may be seen from the peculiar provision of the *Truck Act* of 1831, 1 & 2 Will. IV, c. 37, sec. 8 (acceptance of payment of wages in bank notes not compulsory).

⁴⁸ 3 & 4 Will. IV, c. 98, sec. 6 (1833).

left intact even during the World War. Actual withdrawal of gold from the bank was practically prevented, however, by public declarations that a request for gold would help the enemy.⁴⁹ It was only in 1931 that convertibility was abolished in law.⁵⁰ The notes of the *Banque de France*, founded in 1800, were legal tender from 1848 to 1850 and have been so continuously since 1870;⁵¹ the notes of the German *Reichsbank*, established in 1875 became legal tender in 1910;⁵² the notes of the predecessor of the *Reichsbank*, the *Preussische Staatsbank*, founded in 1775, were never legal tender.⁵³ In the United States national bank notes as well as Federal Reserve notes were only made legal tender by the Legal Tender Act of June 5, 1933,⁵⁴ in spite of the clearly first-rate guarantees offered by them. Legal tender developments in other countries were similar.

Therefore, during the nineteenth century and later, bank-notes circulated everywhere without legal compulsion upon creditors. The monetary nature of the notes was very clearly recognized as early as 1758 by Lord Mansfield in *Miller v. Race*,⁵⁵ and this doctrine has since then become well settled in Anglo-American law.⁵⁶ In continental theory there long prevailed a strong tendency to confine the notion of money to legal tender,⁵⁷ or at least to exclude bank notes from the

⁴⁹ Feavearyear, *The Pound Sterling* (1931) 304.

⁵⁰ *Gold Standard (Amendment) Act 1931*, 21 & 22 Geo. V, c. 46.

⁵¹ *D.P.* 1848 IV 49, 50; 1850 IV 183; 1870 IV 76.

⁵² Law of June 1, 1909, *R.G.Bl.* 1909, 507, art. 3.

⁵³ See James Breit, *Das Bankgesetz* (1911) 5.

⁵⁴ *Infra*, p. 48.

⁵⁵ 1 Burr. 452, 97 Eng. Rep. 398 (K.B., 1758).

⁵⁶ *Moss v. Hancock*, [1899] 2 Q.B. 111 (Q.B., 1899); *Bank of United States v. Bank of Georgia*, 10 Wheat. (23 U.S.) 333 (1825); *Woodruff v. Mississippi*, 162 U.S. 291 (1896); *Klauber v. Biggerstaff*, 47 Wis. 551, 3 N.W. 357 (1879); *Brown v. Perera*, 176 N.Y.S. 215 (1918); *Vick v. Howard*, 136 Va. 101, 116 S.E. 465 (1923); *MacLeod v. Hoover*, 159 La. 244, 105 So. 305 (1925). For foreign law: Nussbaum, *Das Geld* (1925) 29.

⁵⁷ Goldschmidt, *Handbuch des Handelsrechts* (1868) 1069; 2 Gierke, *Deutsches Privatrecht* (1905) 93; Knies, *Das Geld* (2d ed., 1885) 252, 351. A similar notion was voiced by Justice Story, dissenting, in *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Pet. (36 U.S.) 257 (1837), cited *supra*, p. 46, n. 46. The Appellate Court of Hamburg, Feb. 22, 1921, *Hanseatische Rechtszeitschrift* 1922, 86, held that the notes of the German *Reichsbank* circulating within the German colonies were not "money" therein, since the Act making them legal tender had not been extended to the colonies.

category of paper money.⁵⁸ But all these efforts proved futile in the light of the lessons taught by events in the last few decades. The broader conception of money has been acknowledged by the German *Reichsgericht*.⁵⁹ Nowadays it is practically undisputed on the continent.

IV. *Refusable and Irrefusable Money*

The preceding discussion demonstrates that irrefusable (legal tender) and refusable money are to be distinguished. The difference is of a highly technical character. The average citizen knows little about it. He has accepted and continues to accept Federal Reserve notes just as readily as United States notes or dollar coins. Repudiation of refusable money is regarded by the public as chicanery or as a trick to escape performance of an onerous contract. This natural attitude towards refusability is apparent in the few reported cases.⁶⁰ The courts' reaction has been to hold refusable money a good tender "unless specially objected to" and to require such objection to be very explicit.⁶¹ And, of course, payment in refusable money, if not objected to, constitutes a real payment and not a delivery in lieu of payment (*datio in solutum*).⁶² That the bona fide holder of refusable money which has been lost or stolen is protected, just as is the holder of legal tender,

⁵⁸ *Infra*, sec. 7 I. According to Walker, *Money* (1878) 396, McLeod, the English economist, denounced the wider conception of money as "Yankeelism". The present writer has not been able to verify this statement.

⁵⁹ *Reichsgericht*, July 11, 1924, 58 *Entscheidungen des Reichsgerichts in Strafsachen* 255 at 256 [notes issued, during the inflation, by the German Railway Corporation (*Reichseisenbahn-Gesellschaft*) and circulating in payments. Forging such notes was held to be falsification of money]. For a criticism of the traditional continental doctrine, see Scaduto, *I Debiti Pecuniari* (1924) 31 *et seq.*

⁶⁰ *Vick v. Howard*, 136 Va. 101, 116 S.E. 465 (1923); *MacLeod v. Hoover*, 159 La. 244, 105 So. 305 (1925). See, however, *Decamp v. Feay*, 5 Serg. R. (Pa.) 323 (1819).

⁶¹ *Bank of the United States v. Bank of Georgia*, 10 Wheat. (23 U.S.) 333 (1825); *MacLeod v. Hoover*, 159 La. 244, 105 So. 305 (1925). A refusal by the payee to receive a check rather than cash involves a kindred problem which is dealt with by the courts in a similar spirit. See Note, "The requisite medium in a tender of performance of an obligation to pay money", (1928) 76 *U. of Pa. L. R.* 433, and cases cited there, particularly *Simmons v. Swan*, 11 F.(2d) 267 (C.C.A. 1st, 1926), reversed 275 U.S. 113 (1927), regarding a check certified by a reliable bank.

⁶² Under French and German Bankruptcy Laws a *datio in solutum* made by a debtor after, or within the last ten days after insolvency, would be voidable; but a payment would not be voidable. *Infra*, sec. 9 n. 34.

is a rule long recognized in Anglo-American as well as in civil law.⁶³ On the whole, the trend, contrary to prevailing continental theory, is clearly toward assimilating the two types of money. To be sure, as long as the differentiation exists in law, sharp practice or elusive refusals will sometimes be successful.⁶⁴ And the conclusion can hardly be avoided that a sheriff or other officer proceeding on a writ of execution cannot, without the consent of the judgment creditor, accept refusable money in discharge of the debt.⁶⁵

By the so-called Legal Tender Act of June 5, 1933, the United States has abolished the entire distinction. "All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties and dues, *except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.*"⁶⁶ The act, which is novel in monetary legal history, reinstates, as to an important point, the unity of the monetary concept. Viewed from a technical standpoint, it responds to modern developments. In conformity with the recent gold situation the payment of customs has not been excluded from the operation of the act. An objection, however, must be made with

⁶³ *Infra*, p. 54.

⁶⁴ As in *Vick v. Howard*, 136 Va. 101, 116 S.E. 465 (1923). The price for certain real estate was to be paid, in a little Virginia town, within a period ending August 6, 1920. On July 26, the seller, obviously repentant of the bargain, left the town allegedly for a vacation, and returned August 6. Shortly after noon the deed was prepared and in the evening the buyer tendered payment which consisted to a great extent of refusable money. The seller's refusal to receive the money was upheld by the court.

⁶⁵ This is illustrated by the English legislation of 1812, *supra*, p. 45, n. 46. The majority of the American cases take the same view as that advanced above. *Randolph v. Ringgold*, 10 Ark. 279 (1850) (Arkansas bank notes); *Gasquet, Parish & Co. v. Warren*, 2 Smedes & M. (10 Miss.) 514 (1844) (state bank notes); *Harper v. Harvey*, 4 W. Va. 539 (1871); see *McKay v. Smitherman*, 64 N.C. 47 at 50 (1870); 2 Freeman, *Judgments* (5th ed., 1925) 2328. *Contra*: *Governor v. Carter*, 3 Hawks (10 N.C.) 328 (1824) (current bank notes); *Crutchfield v. Robins, Tingley & Co.*, 5 Humph. (24 Tenn.) 15 (1844) (current convertible bank paper). Cf. *Boyd v. Sales*, 39 Ga. 72 (1869) (confederate currency). Consequently the sheriff or other officers of the court should conduct a public sale only on a legal tender basis.

⁶⁶ 48 Stat. 52, as amended 48 Stat. 112, sec. 2, 31 U.S.C. 462. The phrase in italics will be discussed *infra*, p. 51.

regard to minor coins. Under the wording of the federal act one owing a considerable amount may tender bags of copper pennies in order to provoke an unlawful refusal and thus obtain a legal advantage. How far such or similar manoeuvres may be thwarted by equity is open to doubt.⁶⁷

V. Non-Money as Legal Tender

"All legal tender is money, but not all money is legal tender", said a Virginia court in 1923.⁶⁸ We have discussed the second of these propositions in the sense indicated by the court. The first, "All legal tender is money", was believed by the court to be self-evident and has been considered so by other courts.⁶⁹ It will not bear analysis, however.

In ancient Rome, during the civil war, Caesar decreed that creditors should, under certain conditions, receive movables and immovables of the debtor in lieu of money. A similar measure providing for a *datio in solutum necessaria* was adopted in the sixth century by the Emperor Justinian.⁷⁰ During the French Revolution, payment of agricultural rents and certain other debts was, by law, permitted to be made partly in grain.⁷¹ These measures were enacted in the context of a monetary system, albeit shaken and functioning poorly. In that they authorize debtors to discharge ordinary pecuniary debts by goods not contracted for, they differ from primitive customs, under which goods other than coins were the common medium of exchange. It is in this sense that the early colonial laws making corn, tobacco and other commodities legal tender⁷² vary somewhat in nature from the Roman and French decrees just mentioned. Still the fact remains that in order to relieve debtors, money creditors may be, and

⁶⁷ The sweeping language of the act makes it impossible to continue to regard the previous maximum limits of legal tender as still in force: \$10, as to subsidiary silver coins, 21 Stat. 8 (1879), 31 U.S.C. 459; 25 cents as to minor coins, 17 Stat. 427 (1873), 31 U.S.C. 460.

⁶⁸ *Vick v. Howard*, 136 Va. 101 at 109, 116 So. 465 (1923).

⁶⁹ In *Moss v. Hancock*, [1899] 2 Q.B. 111 (Q.B., 1899), *infra*, n. 73; Appellate Court of Dresden, *infra*, n. 76.

⁷⁰ See Steiner, *Datio in solutum* (1914) 160.

⁷¹ Decrees of 16 Frimaire, Year 2 (Dec. 6, 1793), 6 Duvergier, *Collection des Lois* 403; 28 Thermidor, Year 2 (Aug. 15, 1794), 7 *ibid.* 303; 2 Thermidor, Year 3 (July 20, 1795); 8 *ibid.* 237. In Newfoundland a decree of August 18, 1825, permitted the discharge, by delivery of dry cod, of debts for supply of fishing implements. Mater, in 2 *Revue du Droit Bancaire* (1924) 5 at n. 6.

⁷² *Infra*, sec. 15 II.

as a matter of historical fact, have been compelled to accept commodities in discharge of their claims, although such commodities were not circulating media of exchange. That compulsion does not create a new kind of currency. Grain is not money, although by virtue of a statute it is legal tender.

This observation does not only bear on monetary history; it will aid in the better understanding of modern legal problems. In the English Jubilee year 1887, five-pound gold pieces were issued which, although legal tender, did not come into circulation but were dealt in, as articles of virtue, above their nominal value. In *Moss v. Hancock*,⁷³ it was held that the defendant who had bona fide bought such a gold piece, was not protected as a bona fide acquirer of money, but had to restore the piece to its previous possessor. Obviously, the disposition of the case was correct, but the court was embarrassed by the legal tender quality of the piece. The latter was, the court conceded, current coin, hence money because of this quality. But in the case at bar, the Court pointed out, it was used as a medal rather than as a "coin of currency". However, under the theory of the Court the gold piece in itself was money, and protection of a transferee of money depends solely on his being *bona fide*.⁷⁴ Moreover, the transferee had acquired the piece by exchanging it for coins of the same nominal amount, a monetary transaction. Had the Court assumed that the piece was not money at all, the argument would have been simpler and more in accord with the law and the facts.

The same principle is applicable to coins, particularly gold coins, which are legal tender, but which disappear, without being called in by the government, from circulation as a result of a depreciation of the monetary unit. This is true today (1938) of the English sovereign, the gold value of which exceeds its face value by more than 60 per cent. The legal tender rule, since it has not been repealed, continues, but is meaningless. The sovereign is no longer money.⁷⁵ The same

⁷³ [1899] 2 Q.B. 111 (Q.B., 1899).

⁷⁴ And his having given a valuable consideration, *infra*, sec. 5 I.

⁷⁵ This process of demonetization seems to have been recognized in *Ottoman Bank of Nicosia v. Chakarian*, [1938] A.C. 260 (Privy Council, 1937) at 267, 278, and particularly so with regard to Turkish gold coins, at 270. In *Morris v. Ritchie*, [1934] N.Z.L. Rep. Supp. 196, purchasing sovereigns at a premium for resale was punished, under a New Zealand Act of 1919 and regulations of 1932, as dealing with gold coins without license, despite the legal tender feature of the sovereigns. How-

phenomenon occurred elsewhere during the post-war monetary crisis and has given rise to interesting legal questions in Germany⁷⁶ where inflation drove gold coins out of circulation without destroying their "legal-tender" character."

Another unusual legal tender rule is presented where a gold or silver coin is to be received as legal tender according to its weight. This rule, incorporated into the first American Coinage Act of 1792,⁷⁸ as to gold coins still prevails in American law, as has been indicated. Similarly, an English statute of 1774 provided that silver coin should be legal tender up to £25 and above this amount by weight at 5s. 2d. an ounce.⁷⁹ Making legal tender dependent upon the actual weight of each individual coin is impracticable in a developed monetary system.⁸⁰ People in daily life will not resort to instruments for exact weighing and calculating. The legal-tender-by-weight rule which, except for the former English law of 1774, seems neither to exist nor to have existed outside the United States, is a residue of colonial conditions. In making foreign coins legal tender the colonial legislatures invariably stipulated what the weight of such coins should be since they were frequently worn or clipped.⁸¹ It is understandable that after the American experience with "continentals" Congress should have clung to the old formula which seemed to offer a

ever, the fact that the sovereign is still legal tender has enabled the American Treasury, the writer was told, to pay only the equivalent of the nominal amount (\$4.86 = £1) for sovereigns which are taken by foreigners into this country and then delivered, under the Gold Reserve Act, to the American authorities. *Infra*, sec. 6 VII, VIII, IX. This would appear to be unwarrantable for the additional reason that the sovereign is not money in this country. *Infra*, sec. 10 I.

⁷⁶ The *Reichsfinanzhof*, supreme tax court of Germany, consistently held a sales tax applicable to sales of German gold and silver coins, despite the fact that "money", by express provision of the law, was exempt from the tax. Opinion of January 31, 1922, 8 *Gutachten und Entscheidungen des Reichsfinanzhofs* 100. But the Appellate Court of Dresden, January 19, 1922, 22 *Bankarchiv* 241, protected the "bona fide" buyer of stolen German gold coins, which at the time of the theft stood at a premium of more than 800 per cent and had been definitely eliminated from circulation as money. All emphasis was laid by the Court upon the legal tender property of the coins. The decision is obviously unsound.

⁷⁷ The predominant theory concerning the American greenback period is that there existed a "dual monetary system" preserving the monetary character of gold coin. *Infra*, sec. 16 IV.

⁷⁸ Act of April 2, 1792, sec. 16, 1 Stat. 246 at 250.

⁷⁹ 14 Geo. III, c. 42 (1774).

⁸⁰ This has been pointed out by Knapp, *Staatliche Theorie des Geldes* (1923) 291, regarding the English Act of 1774.

⁸¹ Cf. *infra*, sec. 15 III. But see, as to the indiscriminate circulation of the Spanish dollar pieces, *infra*, sec. 16 II.

complete guarantee of the intrinsic value of legal tender. The persistence of the formula to the present day is to be explained only on the ground of American traditionalism. The English law of 1774, on the other hand, must be understood as a groping attempt to legalize substandard worn silver coins,⁸² while seeking to preserve the principle of the full weight requirement. As a matter of fact, this meant the creation of a fiduciary (subsidiary) silver coin, and with the abolition of free silver coinage in 1798,⁸³ the end of the double monetary standard. "Legal-tender-by-weight" was nothing but an intermediary formula which introduced into the law a new and still immature conception.

VI. *Legal Tender and "Cours Forcé" Abroad*

The theory has frequently been advanced, particularly in French cases and legal writings, that the legal tender rule and the *cours forcé* are confined to the territory of origin, that they are strictly "territorial" in character.⁸⁴ It is true that sovereignty, the basis of legal tender and *cours forcé*, does not operate beyond the frontiers of the state, but this fact does not justify the French doctrine. Suppose a New York creditor is entitled by contract to receive a payment in New York in pounds sterling. While the English legal tender rule may not operate directly in such a case, nevertheless the New Yorker, under his contract, can obviously be compelled to receive notes of the Bank of England, and this was also true during the era of the gold standard. Business custom may entitle him to reject, as unfit for mailing, certain English

⁸² W. A. Shaw, *The History of Currency, 1252-1894* (1896) 231, 235; Feavearyear, *The Pound Sterling* (1931) 156, 159. The tentative character of the law also appears in the fact that it was enacted for two years—it was then continued, see Lord Liverpool, *Treatise on the Coins of the Realm*, (reprinted ed., 1880) 144—and in the excessive height of the £25 limit. By the so-called Lord Liverpool Coinage Act of 1816, 56 Geo. III, c. 68, the limit was lowered to 40 shillings.

⁸³ 38 Geo. III, c. 59 (1797).

⁸⁴ See, e.g., *Cour de Cassation*, Jan. 23, 1924, *J.D. Int.* 1924, 685; and, adopting the French point of view, 2 Wharton-Parmelee, *A Treatise on the Conflict of Laws* (3d ed., 1905) no. 517. Under the dominance of *moneta imaginaria* the *valor impositus* of coins had, of course, no significance outside the territory of the "tariffing" sovereign, *supra*, p. 11. This rule, stated by Molinaeus on Baldus' authority (Molinaeus, *Tractatus Commerciorum* (1546) n. 802), has sometimes been applied to modern monetary problems, e.g., by Prof. Meyers, *Nederland'sche Jurisprudentie*, 1931, pp. 280, 281, for the non-application of German revaluation law by Dutch courts, but this can hardly be followed.

coins which are legal tender. But generally everything that represents a pound sterling or a multiple or fraction of it under the law of England is good tender to the pound creditors in New York, as well as in England. In this sense the English legal tender rule operates outside England.⁸⁵ As regards *cours forcé*, as distinct from legal tender, non-convertibility of paper money operates upon the foreign holder exactly as upon the domestic holder.⁸⁶ In this respect, too, the effect of the "*cours forcé*" is extraterritorial.

SECTION 5

MONEY AS PERSONAL PROPERTY

I. Transfer of Specific Money

As a *res corporalis*, a "chattel", money is subject to the general rules applicable to personal property.¹ These rules vary widely in modern legal systems, primarily because the Roman law, still followed in the central European systems, makes passage of title in movables dependent on transfer of possession to the transferee.² This and other differences have little importance in the monetary field.

Of the greatest importance, however, is a special monetary principle which evidences a high degree of uniformity among the modern systems and emphasizes the legal character of money.

Because in monetary intercourse the recipient of money is chiefly concerned with its arithmetical relationship to the ideal unit, it is imperative that he be spared the necessity of inquiry into the title of the person who gives him the money. In line with this, Roman law, while not going the

⁸⁵ Similarly with regard to roubles: *British Bank for Foreign Trade, Ltd. v. Russian Commercial and Industrial Bank*, [1921] 38 T.L.R. 65 (Ch., 1921); and with regard to Turkish money, *Ottoman Bk. of Nicosia v. Chakarian*, [1938] A.C. 260 (Privy Council, 1937) at 278. See also *infra*, sec. 32 II.

⁸⁶ *Infra*, sec. 7 at n. 36, and sec. 28 at n. 38 (impact of "*cours forcé*" upon gold clauses).

¹ The discussion of this subject in Schouler, *Personal Property* (5th ed., 1918) 502, and in (1917) 18 *Ruling Case Law* 1268, is not very satisfactory. The same is true of Kaser, "*Das Geld im Sachenrecht*" (1936) 143 *Archiv für civilistische Praxis* 1. Relying on Savigny's doctrine (*infra*, excursus, following sec. 24), Professor Kaser points out that money conveys to its holder a "*Wertrecht*" (right to a value) which would enure to the possessor rather than to the owner of money.

² German Civil Code 932, Austrian Civil Code 426, Swiss Civil Code 714.

length of protecting *bona fides*, made the transferee owner of the money when through commingling with other money identification had become impossible.³ This rule operated especially where the money did not belong to the transferor. Of course the former owner might maintain a claim for damages in tort or contract. While the commingling of wine, grain and other fungibles resulted in proportionate co-ownership of the whole mass, the commingling of money became the exclusive owner, a difference which despite strong objection by German writers,⁴ is entirely justifiable in point of monetary policy. Modern law reaches the desirable result by protecting the *bona fide* acquirer of money, regardless of the transferor's title. The French Civil Code and its derivatives, however, lean on Roman tradition by requiring both *bona fides* and "consumption" which includes commingling, as conditions of the recipient's protection.⁵ Under German and Swiss law mere transfer to a *bona fide* transferee is sufficient.⁶ The latter better rule is also the Anglo-American law, except that protection of the transferee is conditioned on his giving a valuable consideration.⁷ Good faith is not disproved by the fact

³ Digest 46, 3, sec. 78. This section is taken from the writings of Javolenus (d. 106 A.D.) who cites a certain Gaius (not the famous jurist of later date) as authority. Javolenus states this rule with regard to payments made by a debtor with another's money, but it doubtless applies to money transfers of any kind. It was so understood by the *Reichsgericht*, June 1, 1889, *R.G.Z.* 24, 307, applying Roman law.

⁴ Niemeyer, "*Über den Eigentumsübergang an Geld durch Vermischung*", (1894) 42 *Zeitschrift für das gesamte Handelsrecht* 20.

⁵ French Civil Code 1238; Italian Civil Code 1240, par. 2; Spanish Civil Code 1160; Dutch Civil Code 1420. Regarding the broad meaning of the Code term "consumption", cf. 7 Planiol and Ripert, *Traité Pratique de Droit Civil Français* (1931) 483. Roman tradition is also evidenced in the fact that the rule is stated for payments only. Under the Austrian Civil Code 371, there is no cause of action if the money is indistinguishably mingled with other money, regardless, it seems, of *bona* or *mala fides*. The rule does not apply, however, where the money was mingled with a very slight amount of money belonging to the transferee. Austrian Supreme Court, March 29, 1904, *Sammlung von Zivilrechtlichen Entscheidungen* (New Series) Vol. 7, No. 2648.

⁶ German Civil Code 932; Swiss Civil Code 935. These Codes are moulding the rule in a general way, namely, as a rule regarding the transfer of (a special kind of) personal property. Commingling may be an independent ground for acquiring title. German Civil Code 947, Swiss Civil Code 727.

⁷ *Miller v. Race*, 1 Burr. 452, 97 Eng. Rep. 398 (K.B., 1758) (Lord Mansfield); *Clarke v. Shee*, 1 Cowper 197, 98 Eng. Rep. 1041 (K.B., 1774); *Moss v. Hancock*, [1899] 2 Q.B. 111 (Q.B., 1899); *Wyer v. Dorchester Bank*, 11 Cush. (65 Mass.) 51 (1853); *Depew v. Robards*, 17 Mo. 580 (1855); *Klauber v. Biggerstaff*, 47 Wisc. 551, 3 N.W. 357 (1879); *Merchants' Loan & Trust Co. v. Lamson*, 90 Ill. App. 18 (1892); *Nassau Bk. v. Nat. Bk. of Newburgh*, 159 N.Y. 456, 54 N.E. 66 (1899).

that the transferee overlooked or regarded as unimportant marks found on a coin or note. A different rule would seriously impede the flow of circulating media through the community.

Bona fide holders of money were protected earlier than were holders of negotiable instruments (which did not exist in antiquity). While, in the case of bank notes, the rules overlap,⁸ the monetary rule is, from the viewpoint of public policy, more important. Therefore, the protection accorded the holder of a bank note is somewhat broader than the protection accorded holders of another negotiable instrument.⁹

Apart from the protection granted to *bona fide* holders, Anglo-American law at first in a way similar to Roman law, denied to the original owner of specific money an *in rem* right against a person not a *bona fide* holder who had commingled the money with his own, if identification could not be made;¹⁰ at present, however, the original owner may obtain reimbursement out of the whole quantity found in the mingler's possession, with priority over creditors of the mingler, either on the ground of an equitable claim for a proportionate share in the whole or on the ground of a lien upon it.¹¹ This is, at least, the American point of view.

More remarkable is another divergence between the two great legal systems. Where a person who did not take the money *bona fide* transferred it to a *bona fide* holder protected under the Code, the original owner (O) in civil law, is limited to a personal claim against the wrongdoer (W).¹²

⁸ *Infra*, sec. 8 II.

⁹ In the case of bank notes, the burden is on the plaintiff, claiming recovery, to prove that the holder acquired the notes *mala fide*; in the case of other negotiable instruments the holder must show his *bona fides*. *Wyer v. Dorchester Bank*, 11 Cush. (65 Mass.) 51 (1853).

¹⁰ *Ex parte Dale & Co.*, 11 Ch. D. 772 (Ch., 1879); *Thompson's Appeal*, 22 Pa. 16 (1853); see *Bragg v. Osborn*, 147 Tenn. 381 at 384, 248 S.W. 19 at 20 (1923) ("The old rule undoubtedly was that, since money has no earmarks, it could not be followed when a trustee mingled his own with that of the cestui que trust. Our cases rather lead to the conclusion that there has been no relaxation of this rule in Tennessee.")

¹¹ Restatement, *Restitution* (1937) sec. 209. For the modern development, see Scott, "Right to follow money wrongfully mingled with other money", (1913) 27 *Harv. L. Rev.* 125; Hirsch, "Tracing trust funds—Modern doctrine" (1936) 11 *Temple L.Q.* 11 at 15; Rhodes, "Tracing of assets" (1932) 30 *Mich. L. Rev.* 441.

¹² Still, particular situations may arise which would justify the assumption that O and W are co-owners of a definite quantity of money held separately by W and including specifically O's coins and notes.

Under Anglo-American law, O is legally in a far better position. If the proceeds of W's transaction can be traced into W's possession, O may enforce upon them a constructive trust, or, at his option, an equitable lien to secure his claim for reimbursement from the wrongdoer.¹³ Thus, if W loaned O's money to T, O could prevent W's general creditors from realizing on the debt owed to W by T. If T is himself *mala fide*, or did not give a valuable consideration, O would have the same *in rem* rights against T.¹⁴ It is the variable "fund" constituted by the money or its product or substitute rather than the individual coins or notes, that is envisaged by Anglo-American law. Equity has developed, in this matter, concepts which are broader, more elastic and more modern than the corresponding civil law concepts. This becomes particularly apparent where W deposits O's money in his (W's) bank account. In this very common situation, the civil law invariably reduces O to the position of a general creditor of W, while O is again protected, under Anglo-American law, by *in rem* rights (equitable lien and constructive trust) in the bank account,¹⁵ and this is also true where money of W or of third persons had been paid into the same account.¹⁶

If moneys of several persons are wrongfully mingled by W in his bank account each of them is entitled to share in the

Such conditions were held to exist in the case of *Reichsgericht*, June 1, 1889, R.G.Z. 24, 307, analyzed and criticized by Koesler, (1892) 36 *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* 556. Where, however, the amount of O's money is negligible as compared with W's cash, the rule would operate to make W the owner of the whole with an obligation to indemnify O. This would be true at least under the German Civil Code 947, 948 and the Swiss Civil Code 727. The language of the French Civil Code 573, 574 and of the Italian Civil Code 471, 472 is different; but the outcome would probably be the same. The question has little significance in French law. See 1 Planiol, *Traité Élémentaire de Droit Civil* (12th ed. 1935, by Ripert) No. 2739.

¹³ Restatement, *Restitution* (1937) sec. 202.

¹⁴ Restatement, *ibid.*, sec. 208 (1), sec. 172.

¹⁵ Restatement, *ibid.*, sec. 202. It will be sufficient that W is a fiduciary, not a technical trustee. *Re Halletts Estate, Knatchbull v. Hallett*, 13 Ch. D. 696 (C.A., 1880). In the case of the bank's insolvency O is even given a priority right over the general creditors of the bank. *Patek v. Patek*, 166 Mich. 446, 131 N.W. 1101 (1911). See also 5 Michie, *Banks and Banking* (1932) 169. O's equitable rights in the bank account, however, expire where the bank has in good faith paid out the money pursuant to W's directions [see *Stephens v. Board of Education*, 79 N.Y. 183, 186 (1879); *Justh v. Nat'l Bank*, 56 N.Y. 478 at 484 (1874)] or, in many jurisdictions, where the bank applies the money in payment of an existing indebtedness to itself. *Hatch v. Fourth National Bank*, 147 N.Y. 184, 41 N.E. 403 (1895); see *First National Bank v. City Nat'l Bank*, 102 Mo. App. 357, 76 S.W. 489 (1903). Cf. 5 Michie, *op. cit. supra*, at 172.

¹⁶ Restatement, *Restitution*, secs. 210, 213.

mingled fund in such proportion as his money bore to the whole.¹⁷ Elaborate rules regulate the effects of withdrawals from and additions to the mingled fund,¹⁸ one rule providing that if W wholly or partly dissipates his bank account and subsequently adds to it through new deposits, O's *in rem* rights are limited to the lowest intermediary balance.¹⁹ This canon, of course, cuts down O's protection severely and so does the fact that O must trace his very money into the bank account and produce evidence thereof. In case he does not succeed in this proof, or in case the intermediary balance is insignificant, only a personal claim against W is left for O.²⁰ Consequently, in the majority of cases the practical outcome will be the same as in civil law although the difference between the two systems is by no means merely theoretical.

In English and American cases and writings one frequently encounters the ancient maxim "money has no earmark".²¹ This adage has no definite meaning. In the older cases it was used to *prevent* recovery of mingled moneys.²² It has sometimes been employed in modern cases to *justify* recovery without strict identification.²³ Lord Mansfield thought that this doctrine meant that money might not be recovered from *bona fide* holders for value.²⁴ This seems to be its usual meaning.²⁵

¹⁷ Restatement, *ibid.*, sec. 213; there are doubts, however, whether later payments into the bank will be preferred over earlier payments. *In re Walter J. Schmidt*, 298 Fed. 314 (D.C.S.D.N.Y., 1923).

¹⁸ Restatement, *ibid.*, secs. 211, 212.

¹⁹ Restatement, *ibid.*, sec. 212, indicating exceptions.

²⁰ Restatement, *ibid.*, sec. 215.

²¹ To the effect that this maxim played a large part in medieval English law, see 2 Pollock and Maitland, *History of English Law* (2d ed., 1899) 151-2; cf. Eder, "Legal Theories of Money" (1934), 20 *Corn. L.Q.* 52 at 56. For a collection of English cases, see (1927) 35 *The English and Empire Digest* 167.

²² See cases cited *supra*, n. 10.

²³ "The more practical modern view is the holding that 'money has no earmarks' and that tracing coins and bills into a mass of cash and proving that it remained there is identification sufficient to permit tracing." 4 Bogert, *Trusts and Trustees* (1935) at 2668; cf. *Farmers and Mechanics Nat'l Bank v. King*, 57 Pa. 202 (1868) "An ear-mark is not indispensable to enable a real owner to assert his right of property or to its product or substitute." Other cases adopting liberal views of tracing have stated that the maxim has been expressly rejected so that in equity money may be "earmarked" and followed. See, e.g., *Knatchbull v. Hallett*, 13 Ch. D. 696 (C.A., 1880); cf. 10 Zollman, *Banks and Banking* (1936) at 64-5.

²⁴ *In Miller v. Race*, 1 Burr. 452 (K.B., 1758).

²⁵ See *Stephens v. Board of Education*, 79 N.Y. 183 (1879); *Hatch v. Fourth Nat'l Bank*, 147 N.Y. 184, 41 N.E. 403 (1895).

II. *Delivery of Money for Transmission to Another Person*

Where A gives money to B for transmission to C, a time-honored presumption of Anglo-American law makes of B a fiduciary who must convey the specific money received to C.²⁶ If B violates this duty and employs the money for his own purposes, A and possibly C²⁷ will be given priority over the general creditors of B.

However, under modern conditions the expectation underlying the presumption is, generally, unreasonable. B will ordinarily send C a check or a money order, or, in continental countries, will employ the method of bank remittance. Consequently, B, as was A's intention, will keep the specific money received from A for his own use. In most cases, it will therefore not be very difficult to refute the presumption of a fiduciary relationship. The presumption is in fact being abandoned where B is a bank,²⁸ and it seems to be disappearing generally.²⁹ To this extent, A cannot avail of an *in rem* right against B.

²⁶ See Stone, "Some Legal Problems Involved in the Transmission of Funds" (1921) 21 *Col. L. Rev.* 507.

²⁷ I.e., where A deposits the money with B under an express trust for C. See cases cited in Stone, *supra*, at 508.

²⁸ Even in states where a deposit for a special purpose creates a fiduciary relationship, in a growing number of cases it is held that only a contractual relationship is set up between the sender and the transmitting bank. E.g., *Katcher v. American Express Co.*, 94 N.J.L. 165, 109 Atl. 741 (1920); *Legniti v. Mechanics Bank*, 230 N.Y. 415, 130 N.E. 597 (1921); *Strohmeyer v. Guaranty Trust Co.*, 172 App. Div. 16, 157 N.Y. Supp. 955 (1916); *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 139 N.E. 766 (1923); *Beecher v. Cosmopolitan Trust Co.*, 239 Mass. 48, 131 N.E. 338 (1921); *Samuels v. Drew & Co.*, 296 Fed. 882 (C.C.A. 2d, 1924).

²⁹ Thus it has been held that an agent for collection and payment to his principal of the premiums of a number of insurance policies is under no duty to deliver the exact money in specie, in the absence of any contractual arrangement to the contrary. *Hazelton v. Locke*, 104 Me. 164, 71 Atl. 661 (1908); cf. *Cherry v. Paller*, 91 Pa. Super. Ct. 417 (1927); *Tribune Publishing Co. v. Davis*, 114 Me. 371, 96 Atl. 385 (1916). And no fiduciary relationship will generally be impressed upon an agent who has received money from the plaintiff to be spent for a particular purpose. *Larson v. Dawson*, 24 R.I. 317, 53 Atl. 93 (1902); *Kerwin v. Balhatchett*, 147 Ill. App. 561 (1909); *Orton v. Butler*, 5 B. & Ald. 652, 106 Eng. Rep. 1329 (K.B., 1822). In these cases, the proper remedy is in assumpsit, rather than in trover or conversion. But it has been held that where public moneys deposited in a bank were wrongfully transferred by the bank, which knew that the money was "earmarked" as state money, trover was the proper remedy. *Nebraska v. Omaha Nat'l Bank*, 59 Neb. 483, 81 N.W. 319 (1899). Of course, where defendant received the money solely for safe-keeping, trover may properly be

In civil law, as we have seen, the rule is that where specific money of another is spent by the wrongdoer, the injured person must, on principle, be content with the status of a general creditor of the wrongdoer. Whether the transferee is entitled to make the specific money so received his own, may be important in criminal law³⁰ inasmuch as in the absence of such a right a more serious type of crime would be involved. In private law, however, it is of minor consequence. The existence of a fiduciary relationship will not change the result. The cleavage between Anglo-American and civil law, already noticed, is further in evidence in this situation.

III. Changing Money

"Changing" money, though a very common transaction, is a somewhat curious phenomenon in law, related to sale and barter, and is yet neither of these; it is not barter for the probable reason that money is being dealt with at its nominal rather than its intrinsic value. But it would not be profitable to plumb this conceptual problem since changing of money has given rise to little judicial discussion, except in connection with legal tender.³¹

IV. Litigation Over Specific Money

While there has been only a relative decrease in the use of specific money in payment, litigation over specific money, not infrequent up to the 19th century, has become extremely

brought. *Royce v. Oakes*, 20 R.I. 252, 38 Atl. 371 (1897). The fiduciary relationship was also raised where defendant was a brother and tenant in common of the plaintiffs, so that an action for conversion of money was proper. *Jackson v. Moore*, 94 App. Div. 504, 87 N.Y. Supp. 1101 (1904). See generally, Note (1905) 19 *Harv. L. Rev.* 55; (1921) 21 *Col. L. Rev.* 827; (1927) 50 *A.L.R.* 1167 at 1170.

³⁰ German Penal Code 246, 266, and Ebermayer-Lobe-Rosenberg, *Strafgesetzbuch* (3d ed., 1925) 717, introductory remark no. 3c.

³¹ *Supra*, p. 38. Another point is that banks ordinarily give change to their clients in counted-off packages or bundles. Notice of deficiency, if any, has to be given by the recipient at once, lest his right be waived. This has been held by German courts in cases not recorded. There has been in Germany much theoretical discussion on the subject of changing money. See Goldschmidt, *Handbuch des Handelsrechts* (1868) 1104, n. 11; Wolff in 4 Ehrenberg, *Handbuch des Handelsrechts* I (1917) 626. Goldschmidt cites arts. 903-906 of the *New York Civil Code* as subjecting the change of money to the law of sales. But this refers to the projected Code of David Dudley Field, which never became law in New York. It was, however, adopted in some other states. See, e.g., *Montana Civil Code* (1935 ed.) sec. 7635.

rare.³² This change undoubtedly results from the difficulty of identification of specific money because of the tremendous augmentation of current media, their increased velocity of circulation and their growing uniformity. Monetary litigation has increasingly been absorbed by suits for debts and damages. In minimizing the legal significance of specific money, Anglo-American law is therefore in line with factual developments.

It may also be observed in this connection that in actions for the conversion of money the requirement that the money be specified has been considerably liberalized; while specification of the subject of the action is still called for, a description of the money in a general manner has been held to be sufficient.³³ This gives the injured person easier access to the procedural advantages of trover or conversion.³⁴

Where a money judgment is rendered, the property aspect of money litigation will nonetheless appear as soon as the sheriff levies upon money in the possession of the judgment debtor. While other goods must be sold by the sheriff, money, according to a universal and obvious rule, must simply be delivered in payment to the judgment creditor,³⁵ who there-

³² A recent example would be *Zornes v. Bowen*, Iowa, 274 N.W. 877 (1937) (money as treasure trove).

³³ *Gordon v. Hostetter*, 37 N.Y. 99 at 102 (1867) ("As the amount was conceded, there was no occasion to prove the particulars, in which the coin and bills in question differed from all others of like denomination . . . The money was identified so far as was needful to determine the rights of the parties; and the plaintiffs were bound to go no further.") Same: *Hazelton v. Locke*, 104 Me. 164, 71 Atl. 661 (1908). A situation repeatedly referred to in tort actions is that money was in a bag or otherwise earmarked. *Moss v. Hancock*, [1899] 2 Q.B. 111 (Q.B., 1899) [argument of counsel]; *Knapp v. Springmeier*, 7 Ohio Dec. 570 (1878); see 3 Blackstone *Comm.* * 152.

In replevin, it seems that the stricter rule obtains, requiring the money to be specifically described and the plaintiff to show himself entitled to the specific money described. *Sager v. Blain*, 44 N.Y. 445 (1871) ("clearly the plaintiff had no cause of action for the recovery of the possession of any identical or specific money. None was described . . . in the complaint, and no attempt was made to identify any by the evidence."); *Dowdy v. Calvi*, 14 Ariz. 148, 125 Pac. 873 (1912) ("specific currency, gold and silver" need be described); *Knapp v. Springmeier*, *supra*.

³⁴ Such as the inadmissibility of a set-off by the defendant. See *Orton v. Butler*, 5 B. & Ald. 652, 106 Eng. Rep. 1329 (K.B., 1822). Other advantages given to a person who sues in tort may be the right of attachment and the right of imprisonment of the defendant. See *Sager v. Blain*, 44 N.Y. 445, 448 (1871).

³⁵ German Code of Civil Procedure [*Zivilprozessordnung*] 815; Austrian *Exekutionsordnung* 261; New York *Civil Practice Act* 686. The latter law provides an exception for gold coins, probably a carry-over from the greenback period.

by gets title to it. This rule again illustrates the legal importance of the medium-of-exchange function of money.

V. Transferring Counterfeit Money

If payment is made in counterfeit money (coin or note) the recipient may, under the doctrine of rescission for mistake, treat the payment as a nullity; thereupon the payor, though innocent, has to make another and valid payment.³⁶ The creditor must, however, make his demand within a reasonably short period.³⁷ Earlier cases also hold that in order to have recourse against his transferor, he must, within the same limit of time, return the counterfeit money to the innocent payor,³⁸ but the rule is neither absolute³⁹ nor well settled.⁴⁰ Nowadays, from the urging of the Treasury Department,⁴¹ there has grown up a public willingness to turn counterfeit money over to the authorities immediately.⁴² The bank teller, in particular, will, for this purpose, retain counterfeit money that he has received.⁴³ Such a policy obviously deserves full support by the courts. It seems probable that the return of counterfeit will today no longer be considered a prerequisite of the recipient's claim for a valid payment.

³⁶ 5 Williston, *Contracts* (Rev. ed., 1937) sec. 1572; *Young v. Adams*, 6 Mass. 182 (1810), and other cases cited by Williston, *loc. cit.*, n. 54. Banks accepting counterfeits of their own notes in payment are denied recoupment against the innocent holders. Williston, *loc. cit.*, at n. 5. This exception is of questionable soundness. As to transactions in counterfeit foreign money, see *infra*, sec. 10 I.

³⁷ *Markle v. Hatfield*, 2 Johns. (N.Y.) 455 (Ch. J. Kent, 1807); *President, etc., of the Gloucester Bank v. President, etc., of the Salem Bank*, 17 Mass. 23 (1820) at 45; *Raymond v. Baar*, 13 Serg. & R. (Pa.) 318 (1825); *Curcier v. Pennock*, 14 *ibid.* 51 (1826); *Boyd v. Mexico Southern Bank*, 67 Mo. 537 (1878).

³⁸ *Thomas v. Todd*, 6 Hill. (N.Y.) 340 (1844); *Simms v. Clark*, 11 Ill. 137 (1849).

³⁹ *Burrill v. The Watertown Bank & Loan Co.*, 51 Barb. (N.Y.) 105 (1867) at 112.

⁴⁰ See the conflicting cases cited in Williston, *op. cit.*, n. 56. Under the English *Coinage Offences Act, 1936*, 25 & 26 Geo. V, c. 25, sec. 14, a person who suspects a gold or silver coin tendered to him to be counterfeit or otherwise adulterated may break it. In case the suspicion is justified, the loss falls upon the person who tendered the coin; in the opposite case it falls upon the person who broke it. Disputes will be settled summarily by the Justice of Peace.

⁴¹ Through public warnings and otherwise.

⁴² In England, there is a legal duty to this effect, though confined to coins under the *Coinage Offences Act (supra, n. 40)*, sec. 11(2).

⁴³ Officers of national banks must mark fraudulent notes, 31 U.S.C. 424.

CHAPTER II

KINDS OF MONEY

SECTION 6

COINS

I. *Nature and History*

Coins are metal plates bearing surface authentications of their weight and fineness and designated for circulation within the community.¹ They originated from gold and silver bars which represented definite weights and were possibly authenticated by a recognized agency; in foreign trade such bars are still utilized. The first coins seem to have appeared in Asia Minor during the seventh century B.C. The social implications of the genesis of metal money have been the subject of much reflection and writing. Aristotle, in a famous passage of his *Politics*,² points out the inconveniences of a barter accomplished merely by exchanges of the most diversified useful goods; therefore, men, in the opinion of the philosopher, "contrived" a medium of exchange (such as iron or silver) which, while valuable in itself, could easily be passed from hand to hand in exchange for the needs of life. While this rationalistic explanation has prevailed for two millennia,

¹ In *Gordon v. Magone*, 40 Fed. 747 at 750 (C.C.S.D.N.Y., 1889), dealing with Chinese *taëls*, which are shoe-shaped pieces of silver, it was held that date of issue, name or insignia of sovereign, penalty for counterfeiting, are not essential to the concept of coin. From the ample literature on the origin of coins the following may be cited: Ridgeway, *The Origin of Metallic Currency and Weight Standards* (1892); Laughlin, *Principles of Money* (2d ed., 1919) 8; Burns, *Money and Monetary Policy in Early Times* (1927); Babelon, *Les Origines de la Monnaie* (1897); Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte* (2d ed., 1926) 172. For the economic and technical aspects of coinage, see Ad. Wagner, *Sozialökonomische Theorie des Geldes und Geldwesens* (1909).

within the last century theories of an ethnological character have been advanced; coins are believed to have been first used in such one-sided performances as sacrifices, tributes, and penalties rather than in barter transactions, and recently a theory of the essentially sacral origin of money has been set forth by a German author.³ It is evident that the social process owed more to instinct and was more complex than Aristotle knew. The mystery which surrounds the whole subject of money thus extends to its very origin.

In a modern state community, the unlicensed manufacture of coins is a crime, whether the weight and fineness be equal or not to that of lawful coins. The monopoly of the State ordinarily includes any coin purporting to circulate within the community,⁴ even though the private or non-state character of the issuer is clear from the inscription on the coin. The test in German law is whether the coin bears indication of a money value.⁵ In the United States, as has been mentioned, this rule did not become law until 1864; before that time considerable quantities of private gold coins circulated in various parts of the country.⁶

II. Coins, Medals and Tokens

Coins which do not circulate within the community are not money and therefore not coin in a strict legal sense although they are so in the numismatic and popular senses of the word. Legally, they are mere "medals", as are so-called "commemorative coins" manufactured in amounts so limited as not to cover the demand of collectors. Such coins have a

³ Laum, *Heiliges Geld, Eine Historische Untersuchung über den Sacralen Ursprung des Geldes* (1924). The critical remarks by Burns (*supra*, n. 1) 6 do not gainsay the theory that the priesthood may have contributed to the development of the primitive monetary unit.

⁴ For example, 13 Stat. 120 (1864), 18 U.S.C. 281, prohibiting unauthorized making of coins if "intended for the use and purpose of current money, whether in the resemblance of coins of the United States, or of foreign countries, or of original design"; English *Coinage Act, 1870*, 33 & 34 Vict., c. 10, sec. 5; German Penal Code 146; French law of Sept. 3, 1792: "Manufacturing money is a privilege appertaining only to the Sovereign", 4 Duvergier, *Collection des Lois* 477.

⁵ Decree of June 23, 1910, *R.G.Bl.* 1910, 909 sec. 1; replaced by decree of Dec. 27, 1928, *R.G.Bl.* 1929 I 2. The Supreme Court of Bavaria, March 7, 1929, *J.W.* 1929, 3022, applied the rule to private coins bearing an inscription in terms of "goldmark". This was considered indicative of a money value, although the "reichsmark" was the legal monetary unit. *Infra*, sec. 25 IV.

⁶ *Supra*, p. 27, n. 19.

"rarity" value which renders them unsuited for circulation as media of payment. Commemorative issues, although universal,⁷ are probably nowhere so frequent as in the United States.⁸ Since, in official theory, commemorative coins may become circulating media, their issuance must be authorized by act of Congress in accordance with Article I, Section VIII of the Constitution. The number of these enactments has increased rapidly, reaching a peak of seventeen in 1936; one of the coins even perpetuates the memory of P. T. Barnum.⁹ Some of them have been made legal tender.¹⁰

Tokens given to evidence the receipt in custody of goods to be forwarded or otherwise dealt with are likewise not money. The problem becomes more difficult, however, where tokens are issued to be used in making payments to the issuer. Some American states, for example, have manufactured tokens in fractions of a cent to facilitate collection of sales taxes of less than one cent on small purchases. It has been held that the tokens were not intended to pass current as coin, but to evidence payment of the required tax.¹¹ As always, actual use of the tokens by the community rather than the intention of the issuer should be held decisive. If, in fact, they circulate as a medium of payment, or, in other words, if they are tendered and received not as sales tax receipts, but simply and plainly as a fraction of a cent, they are money.

⁷ As to the English Jubilee five-pound coins of 1887, see *Moss v. Hancock*, [1899] 2 Q.B. 111 (Q.B., 1899) and the analysis *supra*, p. 50.

⁸ See 31 U.S.C. 376-388o. The coins are issued to particular agencies at par on condition that the profits arising from the sale of the coins at a premium be used for the commemorative purposes. See, for a popular account, Arnold Nicholson, "Money in the Make", *Saturday Evening Post* of March 13, 1937, at 19.

⁹ See Nicholson, *ibid.* This particular coin was struck in commemoration of the 100th anniversary of the incorporation of Bridgeport, Conn., birthplace of P. T. Barnum. 31 U.S.C. 388f (1936).

¹⁰ 31 U.S.C. 461. That imposition of legal tender quality does not necessarily make the coin real money has been shown *supra*, p. 49.

¹¹ *Morrow v. Henneford*, 182 Wash. 625, 47 P.(2d) 1016 (1935). As far as the writer knows, the following states have issued sales tax tokens: Colorado, Illinois (special tokens are circulated by the municipalities of Moline and Rock Island), Kansas, Kentucky (through the Arctic Ice Company), Mississippi, New Mexico, Oklahoma, Utah, and Washington. As to the constitutional problem involved, see *infra*, sec. 18 I.

III. Monetary Value of Coins

The "monetary" or "nominal" or "extrinsic" value of a coin may exceed its "metallic" or "intrinsic" value.¹² The mint—on behalf of the State—may deduct from the metallic equivalent of the monetary value of the coin an amount to cover expenses incurred in the coinage process ("coinage", "brassage", in German "*Praegegebuehr*") and even an additional amount as a prerequisite of sovereign power ("seigniorage", in German *Schlagschatz*).¹³ In England since 1666¹⁴ and in the United States since 1875¹⁵ influx of gold was encouraged by making no deduction in coining gold.

"Free coinage" does not signify coinage free of charge, but rather a policy under which everybody is entitled to have his metal coined by the mint. This rule, which is a constituent part of the classical gold standard, has been incorporated into the monetary laws of many gold-standard,¹⁶ and even of non-gold-standard countries.¹⁷ In England and in the United States, under the gold standard, gold coinage was "free" as well as "gratuitous".¹⁸

Ordinarily, in making coin, gold and silver (pure metal) are mixed with a baser metal ("alloy") for the sake of durability. If the alloy, as is usually the case, amounts to one-

¹² The *Silver Purchase Act* of 1934, 48 Stat. 1178, secs. 2 and 9, 31 U.S.C. 311a, 316a, refers to the "monetary" value of the monetary stocks of the United States. This would be the nominal amount of the coins which could be coined from those stocks. See the definition in 48 Stat. 1178 at 1181, sec. 10, 31 U.S.C. 448b.

¹³ The terms "coinage", "brassage", "seigniorage" appear in the *Silver Purchase Act* of 1934, sec. 9, 48 Stat. 1178 at 1181, 31 U.S.C. 316a. They have been used there in a questionable way, *infra*, sec. 17 II. For a valuable economic and historic discussion of seigniorage, see F. A. Walker, *Money* (1891) 181.

¹⁴ 18 Car. II, c. 5. (1666). See "Statutes establishing free and gratuitous coinage in England", *International Monetary Conference* (1879) 309; Feavearyear, *The Pound Sterling* (1931) 109, and tables pp. 346, 347.

¹⁵ 18 Stat. 296, sec. 2, 31 U.S.C. 333.

¹⁶ 17 Stat. 424 at 427, sec. 20, 31 U.S.C. 327, "Any owner of gold bullion may deposit the same at any mint, to be formed into coin or bars for his benefit"; *English Coinage Act, 1870*, 33 & 34 Vict., c. 10, sec. 8; German *Münzgesetz* of August 30, 1924, *R.G.Bl.* 1924 II 254, sec. 7, par. 2.

¹⁷ *E.g.*, Austrian law of August 2, 1892, *Reichsgesetzblatt* 1892, n. 126 (inaugurating the Austrian *Krone*) art. 8.

¹⁸ *Supra*, n. 15 and 16.

tenth of the whole weight ("standard weight"), the coin is "of nine-tenths fineness". In determining the value of the coin, one takes into account only the pure metal.¹⁹

Debasing coin is a rather complex process. Technically, it means the issuance of a novel coin which carries the name of an existing coin but is of less intrinsic value; such issuance, as a rule, is accompanied by a recall of the older coin type. Debasing, unlike devaluation, does not necessarily imply a cutting down of the unit of a monetary system.²⁰ On the other hand, the unit may be cut down without an actual debasing of the coin, as appears from the dollar devaluation which resulted from legislative action. "Depreciation" refers merely to the non-legal (market) process which may, or may not, lead to devaluation and debasing.

The expressions "debasing", "devaluation", "depreciation" are used interchangeably in common parlance, however. No special term exists for what may be called "demonetizing" or, more graphically, "bullionizing" the individual coin through physical alteration. An inducement to deliberate alteration exists where it is forbidden to sell gold coin at a premium.²¹

IV. Abrasion

Variations in the weight of coins from the mint standard may be the result not merely of deliberate acts of fraud but of imperfect coining technique—a factor of little importance today—or of abrasion. The legal tender quality of a coin is ordinarily conditioned on abrasions not exceeding "tolerance",²² that is, a maximum fixed by law. Tolerance, under the law of the United States, amounted to ½ per cent for gold

¹⁹ *Collector v. Richards*, 23 Wall. (90 U.S.) 246 at 258 (1875).

²⁰ This is true in case of the debasing of a fiduciary coin even where it is unlimited legal tender. See the Dutch Law of Nov. 27, 1919, *Staatsblad* 1919 no. 786, reducing the silver content of the guilder by about 13%.

²¹ *Reichsgericht*, Aug. 12, 1937, *J.W.* 1937, 2966, a criminal case, deals with forcible flattening of United States gold coin, deliberately done in order to obtain the higher price of gold bullion. The court points out that a coin is not demonetized until the inscription has become unreadable.

²² The term "tolerance" is likewise used for the "remedy", that is, the maximum overweight or underweight allowed in the coining by the mint.

coins.²³ The loss by abrasion in excess of tolerance ordinarily falls on the last holder of the coin.²⁴ Where such tolerance is not fixed by law, a coin will be legal tender as long as it is recognizable as lawful coin of the country. The Supreme Court of the United States so held in a case which indicates the practical legal bearing of seemingly theoretical monetary questions.²⁵ The conductor of a street car rejected a passenger who had offered as fare a silver ten cent coin worn by natural abrasion but retaining the appearance of a coin duly issued by the United States mint. The court allowed the passenger damages against the street car company.

V. Fiduciary and Fractional Coins

Money which is issued for a nominal value higher than the value of the material used is commonly spoken of as "fiduciary" or "token" money in contradistinction to "full-bodied" money. Deductions of "brassage" are not contrary to the nature of full-bodied money, since the coining process enhances the value of the manufactured object. While the expression "fiduciary money" is suggestive and needs no explanation, the term "token money", despite its wide use, is less fortunate. If one means thereby a token of the ideal unit, full-bodied money is also a token; and if a token of money is meant, the phrase is misleading, since fiduciary money is real money and not merely a token of money.

Fiduciary money may be of coin or paper. The fiduciary coin may be legal tender for any amount, as is the American silver dollar²⁶ or the Dutch guilder,²⁷ or it may be legal tender

²³ Act of Feb. 12, 1873, sec. 14, 17 Stat. 424 at 426, 31 U.S.C. 318, 457. See furthermore *English Coinage Act, 1870*, 33 & 34 Vict., c. 10, secs. 3 and 4; German *Münzgesetz*, sec. 6, par. 2 (2-1/2 thousandth's as to weight, 2 thousandth's as to fineness). American cases are collected in Note, "What money is legal tender" (1934) 31 A.L.R. 246 at 247.

²⁴ Under the German *Münzgesetz*, sec. 11, par. 3, and sec. 12, the loss of wear and tear is borne by the government. The *English Coinage Act, 1870*, sec. 7, places upon the recipient of a gold coin which is underweight a duty to deface such coin, the loss to be borne by the person who tendered the coin. As to recoinage, see Walker, *Money* (1891) 209.

²⁵ *Jersey City and B. R. Co. v. Morgan*, 160 U.S. 288 (1895). A similar case, involving nickel coin, is *Cincinnati Northern Traction v. Rosnagle*, 84 Ohio St. 310, 95 N.E. 884 (1911).

²⁶ Act of Feb. 28, 1878, sec. 1, 20 Stat. 25, 31 U.S.C. 458.

²⁷ The silver one and two and a half guilder pieces are unlimited legal tender. Tate, *Modern Cambist* (28th ed., 1929) 184, and *supra*, p. 19, n. 20.

for a limited amount. Fiduciary coins of the latter type, much the most numerous, are called "subsidiary" or "fractional" coins (*monnaie subsidiaire* or *divisionnaire*; *Scheidemünze*.) If, within a monetary system, there are subsidiary and non-subsidiary silver coins, the former will ordinarily contain less silver pro rata. For instance, in the United States, the silver dollar contains $412\frac{1}{2}$ grains of standard weight silver, whereas the subsidiary half-dollar, quarter and ten cent coins are made in respective fractions ($\frac{1}{2}$, $\frac{1}{4}$, $\frac{1}{10}$) of 385-8/10 grains.²⁸ In American legislative terminology, non-silver subsidiary coins are called "minor coins".²⁹

The holder of fractional coins is frequently entitled to have the coins exchanged for unlimited legal tender, provided the fractional coins offered for exchange amount to a minimum provided by law. For example, this right is vested in the holder of \$20, or its multiple, of subsidiary silver coin, the exchange to be made by the United States Treasury.³⁰ Although the traditional terminology is different, the legal situation is exactly the same as in the case of redeemable paper money, except that the chose in action is evidenced by a metal plate rather than by a sheet of paper.

VI. Trade Coins

Trade coins³¹ which are ordinarily silver coins, such as was the American trade dollar—are designed for use in foreign countries with a still undeveloped monetary system. Unlike fractional coins, their silver content may exceed the standard weight of the domestic coin of the same name. As a rule, trade coins are not money, at least not within the country of issue. Abroad they will assume the nature of favorite media of barter.³² In recent times the use of trade coins has declined considerably.

²⁸ 20 Stat. 25, sec. 1 (1878), 31 U.S.C. 316.

²⁹ 17 Stat. 424 at 427, secs. 16, 17; 31 U.S.C. 317.

³⁰ Act of June 9, 1879, secs. 1, 2, 21 Stat. 7, as amended by Act of May 29, 1920, 41 Stat. 631 at 655, 31 U.S.C. 337, 338. As a result of the nationalization of gold, *infra*, n. 41, the Treasury can give in exchange only Federal Reserve, United States notes, or Silver Certificates. As to minor coins, redemption is discretionary with the Secretary of the Treasury. 34 Stat. 132 (1906), 31 U.S.C. 341.

³¹ See 3 Palgrave's *Dictionary of Political Economy* (1926) 557; 6 Conrad's *Handwörterbuch der Staatswissenschaften* (1910) 817.

³² In the second half of the 19th century the Mexican trade dollar was so popular in Eastern Asia that commercial accounts were sometimes conducted in terms of such dollars. The danger attendant to this

Trade coins have given rise to important questions of law. The Act of February 12, 1873, which created the trade dollar, made it legal tender at the same time, to an amount not exceeding \$5.³³ This was a peculiar measure, because the trade dollar was supposed to be exclusively used abroad.³⁴ Since, at the time of the enactment, the dollar was below silver parity, the legal tender quality of the trade dollar was considered irrelevant. However, silver prices having started to decline, free coinage of trade dollars, permitted by the law of 1873, began to operate and the trade dollar made its shocking appearance in American payments.³⁵ By a Joint Resolution of July 22, 1876, the legal tender quality as well as the free coinage rule of trade dollars were revoked.³⁶ Thereupon the silver party exacted the redemption of the trade dollars at par, and after a long struggle, redemption was granted by an Act of March 3, 1887,³⁷ which became law without the approval or signature of President Cleveland.

Another question involving trade coins arose in the field of international law. The oldest and most famous trade coin, the Austrian *Maria-Theresa thaler*, created in 1780, has long been used in the Red Sea countries and particularly so in Abyssinia; its original design, including the inscription of the year 1780, has been preserved unchanged because any change would have excited the suspicion of the illiterate natives. During the last Italian-Abyssinian war, Austria ceded

custom is illustrated by *Grunwald v. Freese*, 34 Pac. 73 (Cal., 1893), where a suit was brought for the balance of such a dollar account. When the balance was due in 1890, the Mexican trade dollar was valued at 93-1/2 cents; at the time of the initiation of the proceeding, it was worth 83 cents and at the time of the trial (the judgment was rendered in August, 1893) 74-75 cents, owing to the depreciation of the silver value. Monetary units in that period did not fluctuate to a similar extent.

The Indo-Chinese "trade piaster", created in 1895 by the French authorities, constituted, within French Indo-China, a legal-tender money, *Cour de Cassation*, April 4, 1938, *Sirey* 1938 I 188. See also Arnauné, *La Monnaie, le Crédit et le Change* (4th ed., 1909) 327.

³³ 17 Stat. 424, secs. 15, 21. See Carothers, *Fractional Money* (1930) 275.

³⁴ For an explanation of the legislative course, see *infra*, sec. 15 IV. The Act prescribed a weight of 420 grains of fine silver in order to drive out the Mexican trade dollar, which contained 416-1/2 grains, from East Asian circulation. What really happened in Eastern Asia was that the American dollar "went into the melting pot". Morse, "Currency in China", (1907) 38 *Journal of the North China Branch of the Royal Asiatic Society* 56.

³⁵ Hepburn, *A History of Currency in the United States* (1915) 274.

³⁶ 19 Stat. 215.

³⁷ 24 Stat. 634.

to Italy the dies of these coins to be employed by the Italian government in the manufacture of new *Maria-Theresa thalers* for use in Abyssinia.³⁸ After the Abyssinian defeat, Italy incorporated the *thalers* into the new Abyssinian monetary system at a value exceeding their intrinsic worth. Private firms proceeded to manufacture the *thalers* in England without objection on the part of the English government. The latter took the position that cession by Austria of the coinage privilege was ineffective and had resulted in its abandonment.³⁹ It seems very questionable indeed whether a sovereign can validly cede distinctive emblems, such as those appearing on his coins, to another sovereign for exclusive use by the latter.

VII. Restrictions on Ownership of Coins

The legislative fate of the American trade dollars poses the general problem of the power of the State over coins in private hands. Even in the United States, where by virtue of the due process clauses of the Constitution private property enjoys an unrivaled degree of judicial protection, the rule is well settled that there attach to private ownership in coins "those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange". In accordance with this rule, the Supreme Court in *Ling Su Fan v. United States* upheld a Philippine statute which prohibited the export of silver coins from the Philippines so that the owners of the coins were prevented from profiting by their higher value in China.⁴⁰ In the *Gold Clause Cases*, the requisition of gold coins and of gold certificates was approved by the same Court.⁴¹ *A fortiori*, such lesser measures,

³⁸ Italy called in her silver for this purpose because she had no access, or intended to avoid an appeal, to the English silver market. See J. Hans in *Währung und Wirtschaft*, 1935, 187; 1936, 202.

³⁹ *Währung und Wirtschaft*, 1937, 176, citing *Rasegna Economica dall'Africa Italiana* of July, 1937.

⁴⁰ 218 U.S. 302 (1910).

⁴¹ *Nortz v. United States*, 294 U.S. 317 (1935), concerning gold certificates. The legal history of the nationalization of gold in the United States is somewhat involved.

The *Emergency Banking Act* of 1933 extending presidential war powers to the national banking emergency, authorized the President to "regulate and prohibit . . . [the] hoarding" of gold coin, certificates and bullion (48 Stat. 1, sec. 2, 12 U.S.C. 95(a)) and empowered the Secretary of the Treasury to order the requisition of gold and gold certificates, by the government upon payment of an "equivalent amount" of any other form of money (48 Stat. 1, sec. 3, 12 U.S.C. 248(n)). Acting thereunder, the President issued requisition orders on April 5th and

as the withdrawal of legal tender quality, or the prohibition of melting down or selling coins at a premium, are also constitutional.

The validity of the state's action touching coins within its territory is not affected by the fact that they belong to non-resident aliens.⁴² In the exercise of its power over the persons of its nationals, the government may even command its citizens living abroad to deliver coins held by them, pro-

20th, 1933 (Executive Orders No. 6102, 6111; 1933 *Federal Reserve Bull.* 213, 266) and the Secretary of the Treasury issued licensing regulations. (Treasury Order, April 29, 1933; 1933 *Federal Reserve Bull.* 267.) But by an Executive Order of August 28, 1933 (No. 6260; 12 U.S.C. 95 note) the President replaced his previous decrees, though retaining existing liabilities thereunder, with one imposing criminal penalties for continued hoarding, thus changing the ostensible method from direct requisition to prohibition of hoarding. The purpose of this procedure, which actually did not change the law, was probably to forestall any question of exceeding the powers granted to the President under section 2. Moreover, nationalization was extended to gold hoarded in the United States by nonresidents. Still in the case of *United States v. Campbell*, the presidential order of August 28th was invalidated insofar as it imposed criminal penalties for failure to deliver gold to the Treasury. (5 Fed. Supp. 156 (D.C.S.D.N.Y., 1933); for discussions of the *Campbell* Case, see Note (1934) 47 *Harvard Law Rev.* 479; (1934) 34 *Col. Law Rev.* 166; (1934) 43 *Yale Law J.* 497.) The court, after a verbose discussion of other matters, briefly disposed of the case on the ground that the Act of 1933 empowered only the Secretary of the Treasury, and not the President, to requisition gold (i.e., to act *in rem*); the fact that the Treasury Regulations, themselves, covered the field was by an utterly strained argument considered to be of no significance inasmuch as they did not refer to the proper statutory provision. This difficulty was removed by subsequent requisition orders of the Secretary of the Treasury (Treasury Orders of December 28, 1933 and of January 15, 1934; 1934 *Federal Reserve Bull.* 9 and 79) directly issued pursuant to section 3 of the Act of 1933.

A delivery of gold certificates under these orders, gave rise to the *Nortz* Case. Subsequent to such orders, the *Gold Reserve Act* of 1934, 48 Stat. 337, 31 U.S.C. 440 *et seq.*, was passed by Congress. See *infra*, sec. 17 I.

⁴² *Uebersee Finanz-Korporation A. G. v. Rosen*, 83 F.(2d) 225 (C.C.A. 2d, 1936); *certiorari denied*, 298 U.S. 679 (1936). The decision rests on the *Gold Reserve Act* of 1934. However, an important point was not raised by the plaintiff and therefore not discussed by the court. The government had invoked section 3 of the Act (48 Stat. 337 at 340, 31 U.S.C. 442), which orders the Secretary of the Treasury to prescribe with the approval of the President, "the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported or earmarked." The *Provisional Regulations* thereunder mentioned in the preceding note provided *inter alia*, that gold might be "held in custody for foreign or domestic account" only under a license. From the wording of the *Gold Reserve Act* it seems, however, that not the holding but the acquiring and holding of gold is within the scope of the Act. This presupposes that the acquisition occurred after the passage of the *Gold Reserve Act*. Moreover, "holding in custody" would probably not include holding by the owner himself. In *United States v. 98 \$20 U.S. Gold Coins et al.*, 20 F. Supp. 354 (D.C.E.D. Penna., 1937) the point was not made either.

vided, however, that such command does not violate the laws of the countries where the citizen resides or the coins are situated,⁴³ a limitation derived from the jurisdictional priority of territorial sovereignty.⁴⁴ It is probable, however, that privileges attached to coins, such as the legal tender quality, or the very quality of being money, may be withdrawn by the State of origin no matter where the coins are or to whom they belong.

In connection with damages resulting from restriction of ownership, a distinction must be made. In *Ling Su Fan v. United States*,⁴⁵ the Supreme Court denied the plaintiff damages on the ground that legislation "reasonably appropriate to the maintenance of coinage as a medium of exchange at home", is not a violation of a private right. As mentioned in a different connection, the Court distinguished between the intrinsic value of the coin and the value which "does not attach as a mere consequence of intrinsic value", but is due to "public law". The Court's reference is to the legal tender quality which the Court considers "an attribute of law aside from the bullion value" of the coins. The Court's reasoning seems to proceed along two lines. Assuming that the prevention of exportation is directed towards the maintenance of the circulation of legal tender money, the Court first gives public welfare preference over private interest, and secondly feels that the owner of the coin, who receives the benefit of the legal tender quality, must put up with restrictions resulting from measures aimed at the protection of that quality. All this would be true too of a prohibition against melting down coins or selling them at a premium.

This line of distinction seems to be well charted by the Court and useful in other than American law. Applied to the trade dollar problem, it justifies President Cleveland's resentment. To be sure, in the question of trade dollars a special feature was involved inasmuch as the silver owners under the free coinage rule had their silver coined into trade dollars

⁴³ This has not as yet been done by American legislation (as to the Executive Order of April 5, 1933, *cf.* 37 Att. Gen. 155 (1933)). Under it, American residents are not prohibited from acquiring, keeping, or disposing of, gold coin or gold bullion situated abroad. But see, as to German and other continental exchange control regulations, *infra*, sec. 37.

⁴⁴ 1 Hyde, *International Law* (1922) secs. 199, 200; Lawrence, *The Principles of International Law* (7th ed., 1923) 199.

⁴⁵ 218 U.S. 302 (1910).

not for the purpose of exportation in accordance with the legislative intent, but merely to profit by a mistake of the legislature. Thus there was another and probably stronger reason for the President's policy.

VIII. *Compensation for Requisitioned Coins*

Compensation for requisitioned coins seems nowhere to have been denied. The amount recoverable is in controversy. In *Nortz v. United States* where gold certificates were involved, the Court denied recovery beyond the face amount which the government had already paid to the plaintiff in paper dollars. The plaintiff insisted that gold was bought and sold at higher prices in the world markets. The Court, referring to the *Ling Su Fan* case, pointed out, however, that the plaintiff had no right to resort to such markets, since Congress could and did prohibit exportation of and dealing in gold and gold coins.⁴⁶ It would seem natural that the government, having by its own action destroyed the free gold market, should be estopped from pleading this fact in its favor. But this is answered by the argument that a government cannot be made responsible or liable to an individual for acts done in the exercise of its sovereign legislative power.⁴⁷ The argument is just as conclusive against a non-resident alien. Indeed a person who takes his gold coins into a foreign country subjects himself, as to those coins, to the monetary policy of that country. An expectation that no monetary collapse and therefore no drastic measures affecting the gold (or silver) market will occur, is in the nature of speculation.⁴⁸

At present, even where not called in, gold coins are no longer in circulation. In many countries, it is a criminal offense to deal in national coins at a premium, to melt down,

⁴⁶ 294 U.S. 317 (1935). The Court furthermore points out that at the time of the delivery of the gold certificates (January 17, 1934) the dollar was not yet devalued, the devaluation having been proclaimed not earlier than January 31, 1934. This argument too, is untenable, *infra*, sec. 22 II. Transfer of the gold premium to the government may also be achieved by taxation. This was done in France, Law of October 1, 1936, secs. 10 to 14, *D.P.* 1936 IV 393.

⁴⁷ *Horowitz v. United States*, 267 U.S. 458 (1925).

⁴⁸ See the cases cited *supra*, n. 42.

and particularly to export gold coins.⁴⁹ The English law merely prescribes that persons owning gold of an amount exceeding 10,000 pounds must sell it to the Bank of England, at its request, on the basis of the former gold parity; consequently gold coins must be delivered at their nominal value.⁵⁰ In fact gold, coin or bullion, when in English private hands, serves only hoarding or trading purposes. The law of Soviet Russia has never recognized private ownership in gold and silver coins or in foreign exchange.⁵¹

IX. Gold and Silver Bullion

Gold as bullion is also primarily a monetary tool.⁵² Its use as the legal basis for the issuance of paper money⁵³ is and has been more important than its coinage and its former use in the "gold bullion standard".⁵⁴ Even if not used as a reserve against paper money, gold held by the government has a potential monetary power as a basis for increasing the volume of paper money or as a medium for the settlement of international balances. Silver which has always been employed by industry on a larger scale than gold, has lost its predominantly monetary character through depreciation which began

⁴⁹ See, e.g., French Laws of February 12, 1916, and October 16, 1919, suppressing transactions in national currency above nominal value, D.P. 1916 IV 323 and 1920 IV 272; laws of July 3, 1915, and August 25, 1915, prohibiting exportation of gold and silver coins and of gold bullion, D.P. 1915 IV 172 and 196; law of October 20, 1919, prohibiting the melting down of national coins, D.P. 1920 IV 273. The Monetary Law of October 1, 1936, D.P. 1936 IV 393, prohibited transactions in gold and ordained delivery of gold to the *Banque de France*, but free circulation of gold was restored by the law of February 18, 1937, D.P. 1937 IV 65, despite the irredeemability of the bank notes. See Capitant, "La libre circulation de l'or sous le régime du cours forcé", D. H. Chronique 1937, 21. The most common restrictive measure is prohibition of exportation. See League of Nations Documents, C. 373, M. 159; 1930 II 29 *Legislation on Gold*, p. 36.

⁵⁰ *Currency and Bank-Notes Act, 1928* (18 & 19 Geo. V, c. 13) s. 11. This provision has not been altered by the *Gold Standard (Amendment) Act, 1931* (21 & 22 Geo. V, c. 46).

⁵¹ Russian Civil Code, 22, 23, 24.

⁵² The Interim Report of the Gold Delegation of the Financial Committee, League of Nations Documents, C 375, M 161; 1930 II 26 p. 14, shows that at that time more than half of the annual production was absorbed for monetary purposes. This portion must subsequently have considerably grown due to the increasing nationalization of gold.

⁵³ See, e.g., 12 U.S.C. 414 (Federal Reserve Notes); 31 U.S.C. 408 (United States Notes and Treasury notes); 31 U.S.C. 428; 48 Stat. 344, sec. 14 (1934), 31 U.S.C. 757a (gold certificates).

⁵⁴ *Infra*, sec. 12 II.

in the seventies. Remonetization of silver, however, has been undertaken, to a certain extent, by the American legislation of 1933 and 1934.⁵⁵

A monetary legal transaction which has recently assumed importance, is the earmarking of gold by a government or a central note institute on behalf of a foreign government or central note institute. Earmarking gold means setting it aside as the property of another person and recording the transfer by entry in appropriate books or otherwise.⁵⁶ There is little doubt that earmarking results in the transfer of property under the various legal systems,⁵⁷ provided special provisions, if any exist, concerning the transfer of gold⁵⁸ have been observed. Should a foreign government be the transferee, the gold would no longer be subject to the jurisdiction of the *lex rei sitae*, whether for the purposes of attachment, taxation, or statutory restrictions upon transactions in gold.⁵⁹ A difficulty is present in the case of a purchaser from the foreign government, or a common carrier entrusted by the latter with the transportation of the gold, those persons being probably bound by the rules of the *lex rei sitae*.⁶⁰ A central note institute, such as the Bank of England, the *Banque de France*, the *Reichsbank*, etc., has no sovereign immunity since it is a legal

⁵⁵ *Infra*, sec. 17 II.

⁵⁶ Webster's *New International Dictionary* (2d ed., 1936) defines "earmark" thus: "To set aside, coin or bullion for a specific use. . . . Any gold which is held by a bank, especially by the central bank of one country for the special account of a bank of a foreign country is earmarked."

⁵⁷ See *Uniform Sales Act* 19(4); 1 Williston, *Sales* (2d ed., 1924) sec. 274 (appropriation of unascertained goods passes property in the goods). For French law, see Planiol, *Traité Élémentaire de Droit Civil* (12th ed. by Ripert, 1935) no. 2597(1); for German law, German Civil Code 930 (the foreign government or bank being, in the situation supposed, "intermediate" (*mittelbarer*) possessor within the meaning of the Code 868).

⁵⁸ Such as *Gold Reserve Act* of 1934, secs. 3 and 4; 48 Stat. 337 at 340, 31 U.S.C. 442, 443 (earmarking gold subject to consent of the government).

⁵⁹ See Allen, *The Position of Foreign States before National Courts*, (1933) *passim*; 1 Hyde, *International Law*, (1922) sec. 258; Fenwick, *International Law* (1934) 214; and especially as to attachment *Research in International Law* (Harvard Law School) (1932) No. III: "Competence of courts in regard to foreign states", art. 22, at 689.

⁶⁰ A similar question arose during the American liquor prohibition. Foreign-diplomatic officers were exempt from prohibition, see *Research in International Law* (Harvard Law School) (1932) No. I, "Diplomatic privileges and immunities," art. 21 at 113, but they were not permitted to avail themselves of persons subjected to prohibition for the transportation of liquor. Preuss, "Foreign diplomats and the Prohibition Laws" (1932) 30 *Mich. L.R.* 333 at 346.

entity distinct from the state. Gold belonging to such a bank may therefore be subjected to judicial process at the instance of private claimants.⁶¹

Emergency measures concerning gold ordinarily affect gold coin as well as gold bullion although gold bullion may be placed under a stricter regulation.⁶² In the United States, the rules discussed *supra*, p. 70 *et seq.*, apply also to gold bullion. Silver, too, has been partly nationalized in this country.⁶³

SECTION 7

ATTRIBUTES OF PAPER MONEY

I. Paper Money and Money Paper

Although not rejecting the conception of paper money altogether,¹ the French doctrine of the 19th century preferred to distinguish between bank notes (*monnaie-papier*) and State fiat money (*papier-monnaie*). Bank notes were held to be commercial credit instruments like promissory notes or drafts deriving their value not from the law but from public confidence in the solvency of the issuer. The psychological background of this doctrine is clear. The notes of the *Banque de France* (founded in 1800) which were not even misused in the Napoleonic wars, were regarded as quite another thing than the assignats. Up to 1848, the smallest was 500 fr.² Differentiation between bank notes and paper money seemed so much a matter of course to the French courts, that even in 1856, the Appellate Court of Paris, contrary to English

⁶¹ See *Research in International Law*, cit. *supra*, n. 59, art. 26, at 716. There would be no immunity even apart from the fact that the typical central note bank is a real corporation owned by private stockholders.

⁶² In Germany gold bullion was requisitioned by decree of Oct. 2, 1931, *R.G.Bl.* 1931 I 533, gold coins by decrees of July 16, 1938, *R.G.Bl.* 1938 I 901 and 902.

⁶³ *Infra*, sec. 17 II. On the Italian requisition of silver coin during the Abyssinian war, see *supra*, p. 70, n. 38.

¹ The French doctrine was developed in Courcelle-Seneuil, *Les Opérations de Banque* 1852, (here cited from the posthumous 8th edition [1899]) 455, and perhaps in earlier writings of the same author, who apparently contrived the spirited juxtaposition of *monnaie-papier* and *papier-monnaie*. The basic idea, however, appeared as early as 1810 in Huskisson, *The Question concerning the Depreciation of our Currency* 3. Courcelle-Seneuil's theory was entertained by the influential *Traité de Droit Commercial* by Lyon-Caen and Renault (5th ed., 1925) vol. 4, p. 10.

² François-Marsal, 1 *Encyclopédie de Banque et de Bourse* (1930) 29, 30.

theory, held that the notes of the Bank of England were not money.³ The English judicial theory, founded by Lord Mansfield, recognized, as was shown earlier,⁴ the monetary nature of the bank note, and this doctrine has invariably been applied in the United States.⁵ The French theory, which was followed in Germany and elsewhere,⁶ and has even influenced American legislation,⁷ is untenable. While it may be conceded that bank notes are frequently sounder currency than governmental fiat money, this is rather a reason for recognizing than for denying the monetary character of the notes. As a matter of fact, both types of currency are essentially similar. The French theory is based on the assumption that redeemable money is not legal tender. Bank notes may become irredeemable, and state money is frequently redeemable, so that the necessary characteristics of legal tender, and even more of money, cannot be sought in this attribute. With minor differences, the economic and legal functions of both media within the community are the same.

A legalistic variant of the French theory is the proposition that a bank note, or other paper money, evidences a security, that is, that we are confronted with a bond and not money. But the monetary function of circulating within the community, is in no way inconsistent with the fact that a debt is linked to the paper. On the contrary, that fact speaks in favor of its circulation. This issue was decided in *Bank v.*

³ Judgment of February 8, 1856, *D.P.* 1856 II 184.

⁴ *Supra*, p. 46.

⁵ *Supra*, p. 46, n. 56.

⁶ The *Reichsgericht*, October 17, 1888, *R.G.Z.* 22, 265, in a dictum, handed down the puzzling opinion that bank notes, if levied upon by the sheriff, would not come under the well-known rule according to which "money" seized by the sheriff is delivered to the creditor rather than publicly sold (*supra*, p. 60). The "money" quality of the note, also contested by Goldschmidt, *Handbuch des Handelsrechts* (1868) 1218 and by other German writers, was forcefully defended by Adolf Weber, *Die Geldqualität der Banknote* (1900). The old doctrine still seems to prevail in Italy, see 3 Vivante, *Trattato di Diritto Commerciale* (1935) n. 961.

⁷ The *U. S. Code* places U. S. notes and other government paper money under the Title (31) on Money (and Finance) whereas the subject of the National Bank notes and of the notes of the Federal Reserve System is set out in the Title (12) on Banks and Banking. And the New York *Civil Practice Act* sec. 687 exempted "bills . . . issued by a money corporation to circulate as money" from the rules mentioned *supra*, n. 6, on levying upon money. This was only amended in 1936. The very reverse of the traditional theory occurred when a taxpayer in 1936 moved for an injunction preventing the Federal Reserve Board from issuing notes, alleging an unconstitutional delegation of Congressional powers to the Board. *N. Y. Times*, December 19, 1936, 27 L. The outcome of the litigation has not become known.

Supervisors,⁸ where the court regarded United States notes as being both "certificates of indebtedness" and, at the same time, currency. It held that Congress can exempt United States notes as certificates of indebtedness, from state taxation, notwithstanding the currency feature of the notes.

The term "paper money" (*papier-monnaie*, *Papiergeld*, *moneta cartacea*, etc.) is in universal use. The word "currency" is employed by American legislation instead of paper money, especially in the combination "coins and currency",⁹ but the expression "paper money" being both clear and suggestive, it is preferable to employ the word "currency" in its customary sense, to designate the whole of the circulating media of a given monetary system.¹⁰ Coin, in contrast to paper money, is frequently termed "specie".

⁸ 7 Wall. (74 U.S.) 26 (1868); similarly, *Howard Savings Institution v. the Mayor of Newark*, 63 N.J. Law 547 at 549, 44 Atl. 654 (1899). The sound doctrine of this 1868 case was not remembered by the Court in the *Nortz* case. See *infra*, sec. 29 II.

At variance with the basic theory of *Bank v. Supervisors* is *Reichsgericht*, November 28, 1921, R.G.Z. 103, 231 at 235 where the *Darlehenskassenschein*, a special paper money created during the war, is analyzed. The court in broad terms points out that instruments embodying a chose of action are not money; that the *Darlehenskassenscheine* not being redeemable "therefore are money proper and nothing but money"; but that they are not bearer bonds because not embodying a debt. However, in a judgment of May 20, 1926, R.G.Z. 114, 27, at 29, the Court has adopted the theory of the writer, referring to Nussbaum, *Das Geld* (1925) 29.

⁹ See, e.g., 48 Stat. 52, sec. 43 b(1) [1933], 31 U.S.C. 462. Canadian terminology is alike, *British North America Act*, 1867, sec. 94, n. 14. In colonial and post-colonial legal language "currency" means colonial money as contrasted with sterling money. See, e.g., *Terrell v. Ladd*, 2 Wash. (Va.) 150 (1795); *Scott v. Hornsby*, 1 Call (Va.) 41 (1797); *Proudfit v. Murray*, *ibid.* 394 (1798). During the 19th century when paper money consisted almost entirely of State bank notes, bills of exchange calling for payment "in currency", namely, in bank notes, were repeatedly held nonnegotiable. *Farwell v. Kennet*, 7 Mo. 595 (1842). The court based its decision on the fluctuating value of the notes. See also *Chambers v. George*, 15 Ky. 335 (1824); *Rindskoff v. Barret*, 11 Iowa 172 (1860); *Bank of Mobile v. Brown*, 42 Ala. 108 (1868). Where the value of the notes did not fluctuate, the opposite result was reached. *Keith v. Jones*, 9 Johns. (N.Y.) 120 (1812); *Judah v. Harris*, 19 Johns. (N.Y.) 144 (1821); *Lampton v. Haggard*, 19 Ky. 149 (1826). On the former types of "currency" clauses in bills of exchange, see 1 Daniel, *A Treatise on the Law of Negotiable Instruments* (7th ed., 1933) 72, n. 99.

¹⁰ "Currency means money, coined money and paper money equally." *Klauber v. Biggerstaff*, 47 Wis. 551, 3 N.W. 357 (1879); similarly, Webster, *Intern. Dictionary* (2d ed., 1936), verbo "currency"; Hunt, *A Treatise on the Law of Tender* (1903) 95. See also *International Convention for the Suppression of Counterfeiting Currency*, 1929, (1931) 112 *League of Nations Treaty Series* 372 art. 2 ("In the present Convention, the word *currency* is understood to mean paper money (including bank notes) and metallic money the circulation of which is legally authorized.")

II. Survey of the Features of Paper Money

Paper money must be so equipped as to render it appropriate to its objective, *viz.*, to be given and received freely with an eye only to its relationship to the ideal unit. Lest the monetary function be destroyed, no other inquiries, computations or tasks must be required of members of the community.

We are concerned here neither with the economic theory of the prerequisites of sound paper money¹¹ nor with the merely technical make-up of the notes. Being typical mass issues, they must be uniform, except for individual numbering, and adapted in form to monetary use. Because there can be no "tolerance" for paper money, the legal problems relating to wear and tear are of some importance in point of the creditor's duty to receive legal tender. The inscription on the note must be recognizable.¹² The degree to which the legal tender quality will be impaired by defects in the note depends largely on monetary conditions and habits within the individual country concerned. In 1895, the director of an Italian railway company ordered its employees not to sell tickets for paper money which had been torn and pasted together. The order having been followed, he was fined by the Rome Court of Cassation for violation of the legal tender laws.¹³ Since so many notes torn and pasted together, circulated in the country, the Court felt that rejecting them would unduly hamper monetary intercourse and obstruct the use of the railways, and would be particularly disastrous for the non-moneyed class. As a matter of fact, Italian currency was then and even later amazingly poor. The rule should, therefore, certainly not be generalized.¹⁴

In order to simplify the title problem, the instrument will, explicitly or tacitly, be made payable to bearer. It must

¹¹ See, *e.g.*, Walker, *Money* (1891) 395 *et seq.*

¹² Thus the Italian judgment in next note.

¹³ Judgment of Oct. 12, 1895, *Foro Italiano* 1895 II 500.

¹⁴ As to destroying and replacing national bank notes unfit for use, see 18 Stat. 204 at 206 (1874), 12 U.S.C. 124. As to Federal Reserve notes, see 38 Stat. 251 at 266, sec. 16 (1913), 12 U.S.C. 413. A one-dollar United States note from the corner of which 1¼ inch had been torn, was held not to be legal tender for railway fare, *North Hudson County Ry. Co. v. Anderson*, 61 N.J. Law 248, 39 Atl. 905 (1897). As to bank notes cut for mailing purposes and pasted together, see *infra*, p. 91, n. 20.

exhibit on its surface a simple arithmetical relationship to the ideal unit. Paper money does not bear interest,¹⁵ because the necessary computations, varying from day to day and resulting in fractional amounts, would stop its free circulation. During the Civil War, several interest-bearing issues of greenbacks were given legal tender quality for "their face value, excluding interest",¹⁶ but even this expedient did not enable them to circulate freely.¹⁷ The absence of interest is one of the most important practical requirements of paper money.¹⁸

Should the paper embody a right of action, it must be one which matures on demand, for otherwise the question of maturity would require individual scrutiny, and would do away with the uniformity of the issue.

The legal attributes of paper money vary greatly, particularly¹⁹ as to the rights of the holder against the issuer, and as to reserves to be held by the issuer against the notes.

III. *The Chose in Action Embodied in the Paper— Convertibility and Inconvertibility*

Ordinarily the holder of a money note has the right, as against the issuer,²⁰ to payment of the sum specified therein.

¹⁵ 31 U.S.C. 401 expressly provides that United States notes shall not bear interest.

¹⁶ Joint Resolution of Jan. 17, 1863, 12 Stat. 822; Act of June 30, 1864, sec. 3, 13 Stat. 218.

¹⁷ See *Knox v. Lee*, 12 Wall. (79 U.S.) 457 at 646-7 (1870).

¹⁸ The German Bank Law of Aug. 30, 1924 *R.G.Bl.* 1924 II 235, secs. 4 and 39, repeatedly employs the term "banknotes and other bonds payable to bearer and *not bearing interest*". See also section 799 of the German Civil Code, *infra*, p. 90, n. 17. On American government bonds bearing 0.001 per cent interest, *infra*, sec. 18, n. 16.

¹⁹ On the differences in respect to legal tender and public receptability, see *supra*, p. 43.

²⁰ Federal Reserve notes constitute obligations of the United States, 38 Stat. 251 at 265, sec. 16 (1913), 12 U.S.C. 411, but the Federal Reserve Bank which places the notes in circulation is liable on behalf of the federal government for the redemption of the notes which are a first and paramount lien on all assets of the bank, in addition to the collateral and deposits prescribed by the law, 38 Stat. 251 at 266, sec. 16 (1913), 12 U.S.C. 412, 413, 414. The appearance of the bank as "issuer" is eschewed by the language of the law, which is to the effect that the notes are issued to the Federal Reserve Banks (by the Comptroller of the Currency). However, there is a factual issue by the bank since its name is indicated on the notes. It is questionable whether the bank would succeed in avoiding liability to the holder of the note should such a case come up before a court. The former "cir-

In very rare cases the right of action embodied in a note is of a different type. For instance, the greenbacks issued under the statute of February 25, 1862, conferred upon the holder the right to have them exchanged for 6 per cent compound-interest-bearing bonds of the government.²¹ Similarly the holders of German *Rentenbankscheine* of 1923, successfully used as temporary currency for a time, were entitled to receive interest-bearing gold bonds (*Rentenbriefe*, a kind of unredeemable mortgage bond on agricultural and industrial real estate) in exchange.²² The postage currency inaugurated with the government's approval and support during the Civil War is another exceptional instance in that the holder enjoyed mailing privileges against the government.²³

Where the note requires payment in money ("redemption"), notes of the same issuer or of the same type, even though legal tender, are necessarily excluded as media of redemption. The debt of the issuer is therefore a qualified one. It may be qualified even more specifically, as by an express provision of the law requiring redemption in gold.²⁴ American silver certificates are exclusively redeemable in silver.²⁵ Gold redemption has entirely disappeared. The short-lived restoration of the gold standard after the World War did not mean that the holder of the notes was entitled to receive gold coin or other money on each individual note. It meant merely that if he presented the minimum amount required by

culating notes" of the Federal Reserve Banks ("Federal Reserve Bank notes") issued under 38 Stat. 251 at 268, sec. 18 (1913), 12 U.S.C. 441 *et seq.*, were obligations of the bank.

²¹ 12 Stat. 345, sec. 3.

²² Decree on the Establishment of the German *Rentenbank* (*Rentenbank-Verordnung*) of October 15, 1923, *R.G.Bl.* 1923 I 963, sec. 15. See Schacht, *Stabilization of the Mark* (1927) c. 3 and 4; Elster, *Von der Mark zur Reichsmark* (1928); Wilfried Baumgartner, *Le Rentenmark* (Paris, 1925); Mackenzie, *Banking Systems of Great Britain, France, Germany and the U. S.* (2d ed., 1935) 182.

²³ Acts of July 17, 1863, 12 Stat. 592, and of March 3, 1863, sec. 4, 12 Stat. 709 at 711. See Mitchell, *A History of the Greenbacks* (1903) 98, 99, 161, 180, and Carothers, *Fractional Money* (1930) 171.

²⁴ This has been done, *e.g.*, in the case of the gold certificates, Acts of March 3, 1863, sec. 5, 12 Stat. 709 at 711, and March 14, 1900, sec. 6, 31 Stat. 45 at 47, 31 U.S.C. 428, 429, and of the United States notes, Act of March 14, 1900, sec. 2, 31 Stat. 45, 31 U.S.C. 408.

²⁵ Act of Feb. 28, 1878, sec. 3, 20 Stat. 25 at 26, 31 U.S.C. 405 and of June 19, 1934, sec. 5, 48 Stat. 1178, 31 U.S.C. 405a. Therefore they were not "lawful money" within the meaning of the *National Bank Act*, 20 Op. Att. Gen. 725 (1894). This is no longer accurate inasmuch as silver certificates have become legal tender, 31 U.S.C. 462; *supra*, p. 48, at n. 66.

law he could purchase gold bullion with his bank notes. The adoption of this "gold-bullion standard"²⁶ substituted "convertibility" for "redeemability", by embodying in the notes a statutory option to buy gold bars, conditioned upon the offer of a sufficient quantity of such notes. Convertibility has now also been abolished.

Despite the formidable number of noteholders, questions as to their rights rarely arise. Under normal conditions there is little occasion for litigation; and in times of emergency, the legal situation of noteholders is usually precarious. First, there is a tendency to twist the payment provisions of the issuer. Thus it was held by the German-Czechoslovakian Mixed Arbitral Tribunal, set up under the Versailles Treaty, that the notes of the *Deutsch-Ostafrikanische Bank*, which operated in the former German colonies, did not give the holder a contractual claim against the bank. The customary promise to pay printed on the notes was construed by the Court as a mere undertaking by the bank to the German Government.²⁷ Even where the right of the holder is recognized, the court may lack jurisdiction over the issuer. This is the situation particularly with paper money issued by the government, since jurisdiction of the courts over the state is generally restricted.²⁸ In a famous Italian case, the court refused for lack of jurisdiction to determine a claim for damages brought against the *Banco di Napoli*, a bank of issue which had stopped redeeming its notes. Since the claim related to the monetary power of the sovereign, it was regarded by the court as resting on "political" grounds (public law).²⁹ There is also the menace of a suspension of redemption by legislative

²⁶ *Infra*, sec. 12 II.

²⁷ Judgment of February 13, 1925, 5 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 551. Similar was the reasoning of the *Reichsgericht*, November 28, 1921, *R.G.Z.* 103, 231. During the occupation of Poland by the German army a Polish institute of issue was established with the cooperation of the German authorities, the notes carrying the inscription "The German Reich undertakes the guarantee for the payment of this note in German mark at the face value." The claim brought by a holder against the German government for payment of the face amount was dismissed by the Court on the not very plausible ground that the inscription on the notes was only a statement of an obligation incurred by the German Government on behalf of the institution of issue.

²⁸ As to American Federal Law, see 28 U.S.C. 41 (20).

²⁹ Tribunal of Torino, June 9, 1892, *Il Diritto Commerciale* 1892, 695; see Frauz, *Die Verfassung der Staatlichen Zahlungsmittel Italiens* (1911) 124.

enactment. Necessity may make it impossible to fulfill such honest intentions and solemn promises, as the declaration of Congress, enacted in 1869, that "the faith of the United States is solemnly pledged to the payment in coin or its equivalent of all the obligations of the United States not bearing interest known as United States notes . . ." ³⁰ The giving of such a promise is, in some respects, more reprehensible than its breach,³¹ and has been compared, not without adequate reason, to a promise not to become ill.³²

Termination of redemption is usually called "suspension" or "temporary cessation of payments". There are instances where redemption was resumed. Frequently, however, what had been intended as a temporary measure became a permanent one. In any event, since the outcome of a "suspension" is uncertain, any declaration for the future is merely speculative and without legal significance. As long as legislative "suspension" obtains, it has exactly the same effect in law as a legislative cessation which is not stated to be temporary.³³ To be sure, such declarations of temporary purport are frequently used as justification or as pretext for preserving the payment-promise clause in the notes, and its incorporation in new sets of issues. It would be more correct, at least after a short intermediate "time of mourning", to replace the pay-

³⁰ Act of March 18, 1869, 16 Stat. 1, 31 U.S.C. 731. See also Bullock, *Monetary History of the United States* (1900) 71: "For a long time [the Continental] Congress . . . had repeatedly pledged the public honor, its sacred honor, and several other kinds of honor, that the currency would certainly be redeemed at its face value." It may also be mentioned that the New York Constitution, art. VIII, sec. 5, as amended in 1846, explicitly withholds from the legislature the power to suspend the specie payment of bank notes.

³¹ In Prussia the *groschen* were devalued in 1811 after having been first devalued in 1808 under the solemn assurance that a further devaluation would "never" occur, Nussbaum, *Das Geld* (1925) 70, n. 1; and in 1813 new Treasury bills were issued as legal tender, contrary to a promise given in a Royal decree of 1809, see Sobernheim, "*Die Geldentwertung, etc.*" in (1923) 66 *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* 257 at 311. The Austrian government, in 1848, conferred upon irredeemable notes the quality of legal tender, contrary to a promise given in 1816. 1 Savigny, *Obligationenrecht* (1851) 446. See furthermore *infra*, sec. 14, n. 7.

³² Janssen, *Les Conventions Monétaires* (1911) 69.

³³ *Reichsgericht*, Dec. 18, 1920, *R.G.Z.* 101, 141, in view of the decree of Sept. 28, 1914, *R.G.Bl.* 1914, 417, having the force of law and declaring the gold clauses "for the time being" (*bis auf weiteres*) ineffective. See also *Ottoman Bank of Nicosia v. Chakarian*, [1938] A.C. 260 (Privy Council, 1937), regarding Turkish Law, and *Auckland Corp. v. Alliance Ins. Co.*, [1937] A.C. 587 (Privy Council, 1937), describing how in the case of English and New Zealand paper money suspension of redemption became final.

ment-promise clause with a mere statement of the nominal value of the notes. Such a statement, *e.g.*, *five dollars* instead of *promise to pay five dollars* or *five dollars payable to the bearer*, would have the "classical" form of unconvertible paper money. The continuance of the payment promise and of the "redeemable-in-lawful-money" clause in the Federal Reserve notes and in the United States notes is unjustifiable in view of the fact that redemption in gold is not suspended but definitely forbidden by the *Gold Reserve Act* of 1934.³⁴ Since United States notes may be employed in the so-called redemption of Federal Reserve notes and vice versa, the use of this term therein is completely without meaning or value.

Despite the fact that paper money has become practically inconvertible and no longer evidences a debt, such notes must, for reasons of accounting, appear on the liability side of the balance sheet of the bank or other institution of issue. There should be no misapprehension, however, of the legal nature of the notes. The "debtor" has disappeared.³⁵

The foreign holder of paper money will be affected equally with the domestic holder by a suspension or abolition. Paper money is invariably governed by the law of the country of its origin. In a very few cases foreign holders have attempted without success to sue the bank of issue for redemption or damages outside the country of origin.³⁶

³⁴ 48 Stat. 337 at 340, sec. 6, 31 U.S.C. 408a.

³⁵ Should a central note institution under an inconvertibility regime be liquidated, the legislature would have to provide for the protection of the noteholders, and this would probably be done by replacing the notes with those of a newly authorized issuer. But it is improbable that enforceable claims of holders would exist, and certainly claims for payment in coin would not. Realization of the assets of the bank would be impossible, such assets, in the situation supposed, usually consisting mostly of government debts. In no event would contemplation of the highly hypothetical case of the bank's liquidation justify the assumption that a real "debt" underlies the irredeemable note. The question was touched upon in the *Portuguese Bank Note Case*. See *infra*, p. 93 and Kisch, *The Portuguese Bank Note Case* (1932) 184.

³⁶ Appellate Court of Milan, Feb. 18, 1938, *Foro Italiano* 1938 I 575, and Court of Arnhem Nov. 12, 1936, *Nederland'sche Jurisprudentie* 1937, 332, both concerned with notes of the German *Reichsbank*. See also *Reichsgericht*, Sept. 19, 1923 *R.G.Z.* 107, 121, regarding the unredeemability of the notes of the *Deutsch-Ostafrikanische Bank* in Dar-es-Salam.

IV. *Reserves Held Against Paper Money*

Another customary attribute of systems of paper currency is the legal requirement that specific reserves be maintained against the notes issued.³⁷ Such provisions are practically universal for bank notes and are sometimes made for government paper money also.³⁸ They purport to assure redemption as well as to subject the issuance of the notes to definite limitations. The rule is, at least as to bank notes, that reserves of gold, or sometimes silver must be maintained in a certain ratio to outstanding notes. Not only gold, but government securities and prime commercial paper as well, are favorite constituents of note reserves.³⁹ But it was by the *Rentenmark*, a paper money which, contrary to economic theory and historical experience, was based on an hypothecation of German soil, that Germany was redeemed from unparalleled monetary disaster in 1923.

Legal provisions regarding note reserves are not generators of private rights in the noteholder; they are enforced by the government whose business it also is to supervise the administration of the reserves.⁴⁰ The adequacy of administrative protection appears from the fact that notes of bankrupt National Banks continued to be given and received as money because their redemption was fully assured.⁴¹ Noteholders are

³⁷ An exception apparently existed in the case of the earliest American banks. See Dewey, *State Banking before the Civil War* (1910) 73. And, of course, here is a crucial point of monetary salvation projects. See on the *Alberta Social Credit* plan, *supra*, p. 31.

³⁸ As to American gold and silver certificates, see *infra*, p. 86. Regarding United States notes, see Act of March 14, 1900, sec. 2, 31 Stat. 45, 31 U.S.C. 408 (reserve fund of \$150,000,000).

³⁹ In respect to Federal Reserve notes, the law distinguishes between (1) "collateral" or "collateral security" (commercial paper, gold certificates, and under certain circumstances, obligations of the United States) to be pledged to the Reserve Agent, (2) "reserves" (in gold certificates or lawful money) not so pledged, and (3) "deposits" with the Treasury, "of gold certificates". Act of Dec. 23, 1913, sec. 16, 38 Stat. 251 at 265, 12 U.S.C. 412-414. An equitable security interest not constituting a pledge in the strictly legal sense would, in case (1) probably be sufficient since the term "collateral" should be interpreted from a business point of view. In case (3) the expression "deposit" seems to indicate that the Treasury, just as a bank, is entitled to dispose of the "deposited" certificates.

⁴⁰ Regarding the *Banque de France*, see Mater, *Traité Juridique de la Monnaie et du Change* (1925) 77.

⁴¹ National Banks are prohibited from putting such notes back into circulation. Act of June 3, 1864, sec. 39, 13 Stat. 99 at 111, 12 U.S.C. 88.

seldom given a lien on reserves,⁴² and the practical value of such liens in the case of the great central national institutions of issue is negligible.

Under American law, gold held in the Treasury against outstanding gold certificates, silver held against outstanding silver certificates, and certain other funds,⁴³ must be recorded in special accounts of the Treasury; "each of the funds represented by these accounts shall be used for the redemption of the notes and certificates for which they are respectively pledged, and shall be used for no other purpose, the same being held as trust funds".⁴⁴ The gold certificates have, therefore, been repeatedly described in the reports of the Secretary of the Treasury as "warehouse receipts".⁴⁵ Relying on this theory, a holder of gold certificates that had been requisitioned under the 1933 emergency legislation claimed the full market value of the gold certified, the Treasury having refunded only the nominal value of the certificates. The Supreme Court in *Nortz v. United States* denied the claim.⁴⁶

It is true that in legal contemplation gold certificates can hardly be regarded as warehouse receipts since 120 dollar certificates may be issued for each 100 dollars in gold.⁴⁷ Neither the Court nor the government, however, made this point. The Court averred that gold certificates were currency and legal tender and therefore could not be regarded as warehouse

⁴² This occurred in Italy; Royal decree of April 28, 1910, n. 204, *Raccolta Ufficiale* 1910 I 753 art. 15 and 16; Royal decree of Dec. 21, 1927, n. 2325, *ibid.* 1927 IV 4869 (tr. 1928 Federal Reserve Bulletin 642). See Greco, *Corso del Diritto Bancario* (2d ed., 1936) 159. The general liens on the whole of the assets of the bank as set out in 13 Stat. 99 at 114, sec. 47 (1864), 12 U.S.C. 137 (paramount lien of the United States upon all the assets of a deficient national bank association) and in 38 Stat. 251 at 266, sec. 16 (1913), 12 U.S.C. 414, last paragraph (first and paramount lien of Federal Reserve notes on all the assets of a Federal Reserve Bank) are of a different kind.

⁴³ Namely, reserve funds for the redemption of United States notes, Treasury notes and United States notes held against outstanding currency certificates. As to the latter, which have not been issued since 1900, see Hepburn, *A History of Currency in the United States* (1915) 218, 376.

⁴⁴ 31 Stat. 45 at 46, sec. 4 (1900), 31 U.S.C. 146. It is dubious whether this provision still holds good, *infra*, sec. 17 at n. 61.

⁴⁵ Reports for 1928, p. 80; 1930, pp. 29, 604, 607; 1933, p. 375.

⁴⁶ 294 U.S. 317 (1935). Due to the nationalization of gold, the certificates have entirely changed their nature. *Infra*, sec. 17 III at n. 60-62.

⁴⁷ Act of March 3, 1863, sec. 5, 12 Stat. 709 at 711. See 31 U.S.C. 428. Actually the margin of 20 per cent has never been used by the government. Simmonds, "The gold certificate", (1936) 44 *Journ. of Pol. Economy* 534.

receipts. This argument has little force. There is no reason why a warehouse receipt may not also be currency and legal tender. The tobacco notes of Maryland and Virginia served as both.⁴⁸ Generally speaking, the question whether or not an instrument is currency depends on the circulatory characteristics of the instrument and the attitude of the community towards it. The Court was obviously influenced by the theory that an instrument in which a chose in action is embodied cannot be money. That theory was rejected in *Bank v. Supervisors*.⁴⁹ It makes no difference that, contrary to the rule for ordinary certificates of indebtedness, the right of action upon a warehouse receipt is *in rem*.

Even viewing the certificates as warehouse receipts, the Court could have rested its disposition of this case on a simpler and stronger basis. After all, the holder of a warehouse receipt for gold coin should have no better right than one who has gold coin in hand.

SECTION 8

RULES GOVERNING PAPER MONEY ¹

I. *Free Banking and Franchise*

While the tendency of states to monopolize the creation of currency is apparent in the field of paper money, this development is not yet complete. Traces of the old rule of the common law ² under which anyone could establish a bank and issue circulating notes—a rule found also in the earlier German law ³—still persist in the *National Banking Act*. Under that act no franchise is required to establish a national bank association if all the conditions provided by the law for engaging in banking have been satisfied.⁴ Since, however, the establishment of such a banking business is dependent upon

⁴⁸ *Infra*, sec. 15 IV.

⁴⁹ *Supra*, p. 78, n. 8.

¹ Very little has been written about this subject and that little only with an eye to bank notes. The most thorough discussion is 3 Daniel, *A Treatise on the Law of Negotiable Instruments* (7th ed., 1933) 2019.

² *Bank of Augusta v. Earle*, 13 Pet. (38 U.S.) 519 (1839). 3 Daniel, *op. cit.*, sec. 1785.

³ Goldschmidt, *Handbuch des Handelsrechts* (1868) 1220.

⁴ 13 Stat. 104 (1864), 12 U.S.C. 26, 27. The power of the federal government to establish banks of issue was recognized by *McCulloch v. Maryland* (*infra*, sec. 18 III) 4 Wheat. (17 U.S.) 316 (1819).

the grant by the Comptroller of the Currency of a certificate acknowledging compliance with the prerequisites, and since the Comptroller has been given a large discretion in the matter by the Banking Act of 1935,⁵ little is left of the free banking principle. Note issuance by natural or artificial persons other than national banks (and, of course, Federal Reserve banks and the federal government) is barred by a dual death tax of 10 per cent; one laid upon the issuance of "notes used for circulation and paid out by them";⁶ the other, and more important,⁷ laid upon the use for circulation and the paying out of notes of other banks, corporations, municipalities, etc.⁸ Thus law has brought about practically the same results as would spring from a legal monopoly of federal note issuance. In England, it is the Bank of England that holds the bank note monopoly,⁹ in Germany, the *Reichsbank*,¹⁰ in France, the *Banque de France*,¹¹ and in Italy, the *Banca d'Italia*.¹² Some-

⁵ 49 Stat. 684 at 687, 688, sec. 101(e)(1)(2) and (g); 12 U.S.C. 264 e(1) (2), and (g).

⁶ Act of March 3, 1865, sec. 6, 13 Stat. 469 at 484, as amended by Act of Feb. 8, 1875, sec. 19, 18 Stat. 307 at 311; 12 U.S.C. 562. Re-issuance entails another 10 per cent tax. *United States v. Warwick*, 25 Fed. 138 (C.C.N.J., 1885). The exemption for issues not exceeding 5 per cent of the issuer's capital refers to the general note circulation tax as provided by Act of June 3, 1864, sec. 41, 13 Stat. 99 at 111, 12 U.S.C. 541, see 14 Op. Att. Gen. 98 (1872), cf. *Merchants' National Bank of Baltimore v. U. S.*, 214 U.S. 33 (1908); it has been misplaced in the U. S. Code. Notes issued by shopkeepers receivable by them in payment of their sales are, though circulating, not subject to the tax. *Hollister v. Zion's Cooperative Mercantile Institution*, 111 U.S. 62 (1884); *U. S. v. Warwick*, *supra*.

⁷ Because of its larger ambit and because of its effect upon notes of foreign prominence, *infra*, sec. 10, n. 63. Both tax provisions are frequently overlooked, even in textbooks on money and banking.

⁸ Act of Feb. 8, 1875, sec. 19, 18 Stat. 307 at 311, 12 U.S.C. 563. A Georgia county intended to issue bonds of \$5, \$10 and \$20 having 4 per cent interest as local currency. The Attorney General of the United States declared that the issue would not violate the banking laws of the United States. 21 Op. Att. Gen. 70 (1894). Certainly not; but it would infringe Art. I, Sec. 8 of the Federal Constitution, *infra*, sec. 13 at n. 12, and entail the 10 per cent death tax. The issuance of money-like obligations of less than \$1 is unlawful, Act of July 17, 1862, sec. 2, 12 Stat. 592, 18 U.S.C. 293, subject to the exemption indicated in the *Hollister* case, *supra*, n. 6; *U. S. v. Van Auken*, 96 U. S. 366 (1878).

⁹ 3 and 4 W. IV, c. 98 (1833); 18 and 19 Geo. V., c. 13 (1928). The notes of the Scottish banks of issue are not legal tender. See Wallace and McNeill, *Banking Law* (5th ed., 1923) 49.

¹⁰ The German *Privatnotenbanken*, state banks of issue, were deprived of their issue privilege by a law of Dec. 18, 1933, *R.G.Bl.* 1933 II 1034.

¹¹ French laws of April 27 and May 2, 1848, *D.P.* 1848 IV 76 and 86.

¹² Royal Decrees of May 6, 1926, n. 812, *Raccolta Ufficiale* 1926 II 1701, and of Sept. 7, 1926, n. 1506, *Raccolta Ufficiale* 1926 III 3489.

times non-state paper money may emerge which is not and does not purport to be of the nature of bank notes.¹³ This situation was dealt with by the German Emergency Money Act of July 17, 1922,¹⁴ which reflects the experiences of the inflation. The Act requires the consent of the government for the issuance of "any marks, coins, signs and other instruments expressed in sums of money and employed, in payments, as a substitute for the money issued by the Reich, the Reichsbank, or a Private Note Bank".¹⁵ Sweeping provisions of this type do not appear to be in use in other countries.¹⁶

On the whole, therefore, there is practically no difference between coin and paper money as regards state monopoly.

II. *Loss, Theft, Destruction and Other Events Affecting Paper Money*

Such differences as do exist result primarily from the variety of rights attached to paper money and from the transforming impact of changing conditions upon those rights. On the other hand, the trend of the law is in the direction of an integral validity and construction of the whole issue, thus minimizing the individual variations which may affect individual items of the issue. This makes for the further assimilation of paper money and coin.

The importance of the latter tendency appears most clearly when seen from the vantage point of the continental laws for the protection of the owners of bearer warrants lost by theft, destruction or otherwise. Such protection is afforded

The former note privileges of the *Banco di Napoli* and of the *Banco di Sicilia* are abrogated. See 1 Greco, *Corso di Diritto Bancario* (2d ed., 1936) 158.

¹³ See *supra*, p. 28, n. 22, and as to the lenient American practice in respect to city issues, *infra*, sec. 18 at n. 12.

¹⁴ *R.G.Bl.* 1922 I 693, as amended by decree of Oct. 26, 1923, *R.G.Bl.* 1923 I 1065. On the ineffectiveness of the statute during the Ruhr invasion, see *supra*, p. 28, n. 23.

¹⁵ *Supra*, n. 10.

¹⁶ A French law of July 11, 1885, *D.P.* 1885 IV 83, makes a crime the unlawful manufacturing, hawking, selling, and distributing of instruments which resemble bank notes, so as to make them receivable like veritable bank notes. A similar result is brought about in the United States by the interaction of various statutory provisions: (a) the prohibition against fractional currency (*supra*, n. 8); (b) the prohibition against the issuance of coins for circulatory purposes (*supra*, p. 27, n. 20); (c) the death tax of 10 per cent on paper money issued without federal authority (*supra*, n. 6-8).

through special proceedings in which, after public notice of loss and upon the expiration of a certain period thereafter, the issuer is forbidden to pay the unlawful holder of the lost instrument, which is then invalidated and replaced by a substitute instrument delivered by the issuer to the applicant. Extension of these provisions to paper money notes, even when they are in the nature of bearer warrants, would obviously destroy legal uniformity of circulating notes and so impair the normal functioning of the entire monetary system. For these reasons bank notes and other paper money are expressly exempt from the operation of such laws.¹⁷

Anglo-American law affords no such remedy to the owner of bearer warrants, and, for that reason, makes no special provision by way of exception for paper money. Since, just as in civil law, *bona fide* acquirers of money stand in an even stronger position than holders of negotiable instruments,¹⁸ the risk to the owner of paper money is likewise greater. It will not matter to him whether he loses coin or paper money. Touching bank notes destroyed by fire, some older cases hold that the bank remains obligated to pay the last owner provided he produces sufficient evidence of the total destruction of the notes, and posts a bond to indemnify the bank should the allegedly destroyed notes turn up.¹⁹ It would appear, therefore, that he would certainly be entitled to the lesser right of receiving a substitute bank note for the same amount instead of redemption. The lesser remedy would, in fact, be the only remedy if the note was inconvertible. The rule was, however, laid down a century ago in very cautious language in relation to state bank notes. It was not then beyond a bank's powers to scrutinize incoming notes. The situation is far different with a modern national paper money, such as Federal Reserve notes, United States notes, notes of the Bank of England, *etc.*, and it is unlikely that courts will extend the

¹⁷ German Civil Code 799 (excluding from public summons and judicial cancellation "bonds on bearer, payable on demand and not bearing interest", an inaccurate formula which should be construed as encompassing every kind of paper money); French *Loi relative aux titres au porteur*, June 15-July 5, 1872, sec. 16, *D.P.* 1872 IV 112; Italian regulation of Oct. 30, 1896, n. 508, *Raccolta Ufficiale* 1896 III 3490; 1 Greco, *op. cit. supra*, p. 89, n. 12, at 181.

¹⁸ *Supra*, p. 55.

¹⁹ *Wade v. New Orleans Canal & Banking Co.*, 8 Rob. (La.) 140 (1844); *cf. Hinsdale v. The Bank of Orange*, 6 Wend. (N.Y.) 378 (1831).

rule to such kinds of paper money. If the note is destroyed, it would seem to be as much gone as a destroyed coin.²⁰

On the other hand, while it is physically intact, each note is just as good as any other note of the same issue. No discrimination among them is permissible. For this reason the statute of limitations does not run against rights upon the paper, nor are such rights extinguished by redemption; the notes may be lawfully reissued again and again.²¹ Paper money lost or stolen from the issuer or fraudulently or surreptitiously put into circulation will confer upon the *bona fide* acquirer all the rights ordinarily connected with ownership of the paper.²² And when paper money has depreciated, an in-

²⁰ As to American law, see Act of June 23, 1874, sec. 1, 18 Stat. 206, 12 U.S.C. 124 (on worn or mutilated national bank notes). An early nineteenth century commercial practice in England and in America was the severance of bank notes to insure protection against failure of delivery through the mails. The legal effect of such severance was destruction of the negotiability of either half by itself because it might eventually come into the hands of different *bona fide* holders. *Story, Promissory Notes* (7th ed., 1878) sec. 111; *Mayor v. Johnson*, 3 Campbell 324, 170 Eng. Rep. 1398 [K.B., 1813]. American courts have held the joined halves negotiable. *Union Bank v. Warren*, 4 Sneed (Tenn.) 167 at 170 (1856); *Patton v. State Bank*, 2 Nott & McCord (S.C.) 464 (1820); *Martin v. Bank of U. S.*, 4 Wash. Cir. Rep. 253, Fed. Cas. No. 9,156 (C.C.E.D.N.Y., 1821); *Bank of the U. S. v. Still*, 5 Conn. 106 (1824); *Farmers' Bank v. Reynolds*, 4 Rand (Va.) 186 (1826); *Hinsdale v. Bank of Orange*, 6 Wend. (N.Y.) 378 (1831). The First Bank of the United States issued "half notes" or "duplicates", payment to be made on presentation of both halves or guarantee of destruction of the other half. Holdsworth & Dewey, "The First and Second Banks of the U. S.", (*Publications of the National Monetary Commission*, 1911) 50. Protection from possible injury as a consequence of the doctrine mentioned is accomplished by stringent rules of evidence in connection with proof of loss, theft or destruction and by the imposition of severe penal sanctions (e.g. of forgery) for the joining of portions of instruments with intention to defraud. 35 Stat. 1088 at 1119, sec. 162 (1909), 18 U.S.C. 276; N. Y. Penal Law, sec. 880; Pa. Stat. Ann. (Purdon, 1936) Tit. 18, sec. 3613; Ill. Rev. Stat. (Cahill, 1935), c. 38, sec. 264.

The German Bank Law of August 30, 1924, *R.G.BI.* 1924 II 235, sec. 32, par. 1, places the *Reichsbank* under a duty to deliver a substitute note for a part of the note, provided the part is larger than the half or it is proven by the holder that the missing part is destroyed. The bank may deduct its expenses for investigation. Sec. 32, par. 2, adds that the bank is not obligated to deliver a substitute for notes destroyed or lost.

²¹ See 2 Morse, *Treatise on the Law of Banks and Banking* (6th ed., 1928), sec. 643; 3 Daniel, *op. cit. supra*, p. 87, n. 1, sec. 2004; Hart, *The Law of Banking* (3d ed., 1914) 568 (e) (no new tax on reissue).

²² See 3 Daniel, *op. cit.*, at sec. 2000. As for notes fraudulently and surreptitiously put into circulation, see *Cooke v. United States*, 91 U.S. 389 (1875). 27 Stat. 322 (1892), 12 U.S.C. 125, makes the rules pertaining to the redemption of national bank notes applicable to such

dividual holder cannot be allowed revaluation, even on the most equitable grounds.²³

Whatever the rights of the holder, there is no collective protection such as modern law has elaborated in favor of security holders. Lord Mansfield's doctrine contrasting bank notes and securities has been resurrected in novel form. Neither the *Securities Act* of 1933,²⁴ nor the *Securities Exchange Act* of 1934²⁵ are available to vindicate the claims of injured money holders nor does the legal organization of bondholders, as provided, *e.g.*, by German law, cover their rights.²⁶ The aim of the laws mentioned is to safeguard investments.

As regards the relation between the giver and receiver of paper money, there need be just as little privity between them as in coin transactions. It was an understanding of the exigencies of monetary intercourse, which guided the majority of American courts in their decision that the innocent transferor of a bank note does not warrant the solvency of

notes "that have been or may be issued (*namely by the Comptroller of the currency*) to, or received by any national bank, notwithstanding such notes may have been lost or stolen from the bank and put in circulation without the signature or upon the forged signature of the president or vice-president and cashier". The gist of this rule is of universal validity; its extension to cases where the signature is missing or is forged, however, is influenced and conditioned upon the cooperation of the Comptroller of the Currency who furnished the notes to the bank. 31 Stat. 45 at 49, sec. 12 (1900) as amended by 40 Stat. 342, sec. 2 (1917), 12 U.S.C. 101; 13 Stat. 99 at 105, sec. 22 (1864), as amended by 40 Stat. 1314 at 1315, sec. 4 (1919), 12 U.S.C. 104. Regarding the ineffectiveness of private marks in paper money, see *supra*, p. 55.

²³ *Reichsgericht*, May 20, 1926, *R.G.Z.* 114, 27 at 32; June 20, 1929, *ibid.* 125, 273; Nov. 25, 1926, 69 *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* 360. See *infra*, sec. 24 at n. 20.

²⁴ Paper money of the United States, even if considered to be securities, would be exempt from the *Securities Act* of 1933, 48 Stat. 74 at 75, 15 U.S.C. 77c under par. 3 (a) (2), exempting securities issued by the United States or by any person controlled or supervised by and acting as an instrumentality of the government of the United States.

²⁵ Sec. 3 (10) of the *Securities Exchange Act* of 1934, 48 Stat. 881 at 882, 15 U.S.C. 78c: "The term *security* . . . shall not include currency . . ."

²⁶ The German law of Dec. 4, 1899, *R.G.BI.* 1899, 691, provides for a bondholders' meeting as an agency for vindicating the common rights of the bondholders and granting time to a financially embarrassed issuer. It is generally believed that this statute does not apply to banknotes. James Breit, *Das Bankgesetz* (1911) 63. On similar laws of other countries, see Domke, "Vers un nouvel effort de la protection internationale des obligataires", *Nouvelle Revue de Droit International Privé*, 1936, 22; Krehér, *La Défense des Obligataires* (1933).

the bank, even though the bank was insolvent at the time of the transfer.²⁷ This question is now, indeed, no longer important.²⁸

III. *The Portuguese Bank Note Case*

Of greater significance under present conditions, are the special problems originating in the issuance of inconvertible paper money. The famous English case of *Banco de Portugal v. Waterlow & Sons, Ltd.*,²⁹ is suggestive in this respect.

Early in 1925, a swindling ring, by an incredibly ingenious manoeuvre, induced the reputable printing firm of Waterlow & Co. of London, official printers of the notes of the Banco de Portugal, to run off on the plates of the bank 200,000 notes of 500 *escudos* each, carrying the picture of Vasco da Gama, and to deliver the notes to the ring. In the course of the year another 280,000 notes followed. The gold parity of the *escudo*, the Portuguese monetary unit, had originally been four shillings five and a quarter pence. At the time of the crime it had depreciated to about two and a half pence, the notes of the *Banco de Portugal*, the only bank of issue of the country, having been inconvertible since 1891. 500 *escudos* were therefore equivalent to about five pounds sterling (gold). Through a bank established by them in Portugal, the swindlers, by the end of 1925, had circulated more than 200,000 of the notes, amounting to about 100 million *escudos*. In December, 1925, under dramatic circumstances, the crime was discovered. The *Banco de Portugal*, in order to avert a mone-

²⁷ The material is collected in 3 Daniel, *op. cit. supra*, p. 87, n. 1, at 2025. He supports the view stated. *Bayard v. Shunk*, 1 Watts & Sergeants (Pa.) 92 (1841), and *Lowrey v. Murrell*, 2 Port (Ala.) 280 (1835), are outstanding. Among the contrary cases is *Fogg v. Sawyer*, 9 N.H. 365 (1838). Surprisingly, Mr. Steiner in his widely-used volume on *Money and Banking* cites this case, and this case only, as the sole holding of the courts. The Italian Court of Cassation, March 7, 1924, *R.D.Comm.* 1924 II 364, held that the transferor, by putting his name on the banknote did not undertake a special liability as to genuineness or validity, apart from the existing legal obligation as to genuineness, towards the transferee. On the other hand, the English courts placed the risk upon the transferor, 3 Daniel, *op. cit.*, at 2029.

²⁸ Because of the federal act which taxed state bank notes out of existence. *Veazie Bank v. Fenno*, 8 Wall. (75 U.S.) 533 (1869). Circulation of national bank notes is also becoming insignificant, *infra*, sec. 17, n. 64.

²⁹ [1932] A.C. 452 (H. of L., 1932). As to the criminalistic aspects of the case, see Rhodes, *The Craft of Forgery* (1934) 173.

tary catastrophe, decided, not only to exchange the spurious notes issued by the swindlers, but also to call in the whole Vasco da Gama series and replace it with a new issue. The exchange of the spurious notes was facilitated by the fact that the bank was authorized to emit notes up to 195 million for its commercial business, and at the time of discovery had actually issued only 64 million. This left a balance more than sufficient for carrying through the exchange. The *Banco de Portugal* sued Waterlow & Co. for damages suffered as a result of the printer's breach of contract and negligence. The bank claimed the full exchange value of the unauthorized 500 *escudo* notes turned in (£1,092,281) plus the printing cost of the genuine notes given in exchange (£6,541), deducting, however, an amount of £488,430 realized from the compulsory liquidation of the swindlers' bank. The House of Lords by a 3 to 2 decision allowed the claim. The majority of the Court of Appeal had granted half the claim, Scrutton, L.J., voting for its entire dismissal.³⁰ Each judge of both Courts gave a separate opinion. An entire volume on the case was published in 1932 by Sir Cecil H. Kisch under the title "The Portuguese Bank Note Case", which, while treating the case primarily from a financial angle, offers as well much data of legal value.

Despite the abundant discussion of the case on the trial, in the opinions, and by Kisch, it offers a wealth of unexplored material on the peculiar nature of inconvertible paper money.³¹ The decision of the House of Lords was based essentially on the argument that the bank, in exchanging its genuine for spurious notes, had suffered a loss measured by the value which the notes would in the normal course of events, have realized. This in the opinion of the Court was the full exchange value of the notes. The minority relied on the argument that the notes, in the hands of the bank, had no value over and above the printing cost which would obviously have been the only loss suffered had the notes been burned in the bank's vaults. The exchange of the genuine for the spurious notes did not add to the bank's burden if the inconvertibility of the notes were taken into account.

³⁰ 100 L.J. (K.B.) 465 (C.A., 1931).

³¹ An economically unique feature is the fact that the inflationary injection was made into a perfectly anaesthetic patient. No experiment even of highest ingenuity could reproduce such a situation.

As a matter of fact, there is an important difference between notes in the hands of the bank of issue and notes in circulation. The latter may be used by the holder at his whim, which is not the case with notes held by the bank. A bank of issue, particularly a central note institution like the *Banco de Portugal*, is both by law and the exigencies of currency protection strictly confined to certain types of transactions, principally discounting (or rather rediscounting) of bills of exchange and commercial paper. The law of Portugal provides much as do the laws of other countries that the bank's discount and loan operations must be effected for a period not exceeding three months; bonds or commercial papers which are discounted should as a rule carry the signatures of three, never less than two, firms of established credit and recognized solvency, *etc.*³² Opportunities for such discounting will depend on the changing business conditions of the country. The bank is, on principle, unable to create the conditions of the note issuance by its own action. (The qualifications of this proposition are for the purposes of this discussion irrelevant.) Hence, the inconvertible note in the hands of the bank has a potential value which is far below that of a circulating note and difficult to formulate in exact figures. We are then faced with a sort of economic miracle: the value of the note is entirely metamorphosed by the issuance process. The two values are not equal nor does a definite ratio pertain between them. Hence when the bank issues a genuine note for a forged one, the gain of the recipient is not the same as the loss to the bank. Certainly the bank is damaged, since it has reduced its future permissible issue.

In the *Portuguese Bank Note* case there was neither allegation of, nor inquiry into, the amount of loss suffered in terms of this or a similar analysis. A scrutiny of the transactions of the swindlers' bank would perhaps have permitted a rough estimate of the rediscounting profit lost by the Bank of Portugal because of the reasonable credit demands satisfied by the swindlers' bank, the spurious notes circulated by which constituted about six per cent of the entire Portuguese currency.³³ In no event, however, could the loss of the bank have equalled the face value of the notes. Had the bank used

³² See Kisch, *op. cit.*, at 155.

³³ The total note circulation in Portugal was, in 1925, about 1700 million *escudos*. See [1932] A.C. 452 at 465.

the 200,000 500-escudo notes for discounting rather than for exchange purposes, the discounted commercial paper would not have become a definitive asset of the bank in a financial sense; it would rather have been security for the repayment of loans given by the bank. The borrower would have delivered to the bank, in discharge of his obligation, notes subject to the issuance restrictions mentioned. No profit other than discounts could accrue to the bank, and nothing could lawfully be claimed by the bank as damages except loss of such discounts and the cost of printing new notes.

Sir Cecil Kisch, viewing the matter from the economist's angle, also feels that the bank did not suffer the loss claimed. He stresses the fact that the bank had done nothing to eliminate the fraudulent inflation, to do which would indeed have required expenditure of its own funds. It had acquiesced in the inflation. Not even the yield arising from the liquidation of the swindlers' bank was withdrawn from circulation; it was appropriated by the government in return for Treasury bills.³⁴ Moreover, cooperating with the government, the bank proceeded to a further expansion of the paper currency. A government decree of July 19, 1926, authorized the bank to raise its note circulation (1) by 100 million *escudos* in lieu of the amount consumed through the exchange of the spurious notes, (2) by another 100 million *escudos* to be issued on a commercial basis, (3) by an additional 125 million to be advanced to the government for purposes of colonial development.³⁵ The bank used these powers, depressing the foreign exchange rate of the *escudo* in terms of the English pound about 13.7 per cent from 95 in December, 1925, to 108 in 1928. The factual stabilization at that point was made a legal one in 1931, but did not last long.³⁶ In the opinion of Kisch, the policy described resulted in very great profits to the bank, and he concludes his book, somewhat sardonically, with "congratulation to the bank on the results achieved."

From a legal viewpoint, it is certain that if the bank had incurred real expenses in order to soak up the inflationary issue, it would have been entitled to recovery. But this is an academic question. The decree of the government restoring

³⁴ See Kisch, *op. cit.*, at 238.

³⁵ See Kisch, *op. cit.*, at 170, 192, 230.

³⁶ The Portuguese currency very soon became implicated in the crisis of the English Pound. Kisch, *op. cit.*, at 280.

the impaired power of the bank constituted the independent act of a third person and, therefore, could hardly have been relied upon by the defendant, particularly as the Portuguese government had taken the precaution, in granting the substitute issuing power, to reserve all rights against the defendant. The other measures of the government and the bank are less relevant. Kisch seems to assume that the "success" of the illicit inflation moved the Portuguese authorities to indulge in an inflationary policy. This is mere conjecture. Certainly there is no reason for assuming a connection between the alleged financial outcome of the bank's monetary policy up to 1928 or even 1931 and the *Portuguese Bank Note* case. Success or failure of such a course of conduct depends to a great extent on the general business conditions of the country. On the whole, 1925 to 1928 were boom years, a fact not taken into account by Kisch.

Nevertheless, his discussion is highly instructive.³⁷ It discloses the interpenetration of bank and government which is the inevitable result under a regime of inconvertibility. For instance, the Portuguese government paid the bank so-called interest of 1 per cent on its debts which amounted to more than 90 per cent of the entire note issue; five-eighths of the interest was devoted to an amortization fund while three-eighths covered the bank's own cost in issuing the notes.³⁸ Practically, this meant no redemption and no interest. Yet the debt was, to its full extent, a basis of note issue. Increase or decrease of the debt had little actual significance except for possible repercussions on note circulation. A shift to the government of the amount recovered by the bank from Waterlow & Co.³⁹ would have required a ledger operation without actual transfer of equivalent assets from the government to the bank.

³⁷ The discussion of the case by R. G. Hawtrey, the well-known author on money and credit, in (1932) 42 *Economic Journal* 391, is less helpful. He believes the adjudication of the case to be correct. He sees only one possible objection to the decision, namely, that the decree of 1926 had added 100 millions *escudos* to the commercial issue, thus seemingly compensating the bank for its loss. Hawtrey points out that the objection fails because it is a mistake to suppose that a bank of issue necessarily *can* recoup itself for its losses by increasing the issue. This may or may not be so; the relevant points are entirely different. Incidentally, expansion of the issue will ordinarily enhance the bank's profit chances and thus will in some measure offset its loss.

³⁸ *Id.*, at 165, 207.

³⁹ This was obviously what happened. Under the decree of July 19, 1926, the bank could not keep the pounds received without using

In any case, the lawsuit came as an extraordinary stroke of business for the bank and the affiliated Portuguese government. The financial gain was enhanced by the English rules as to foreign currency debts. Assuming as true that, as a result of the crime, the bank had foregone a profit of about 90 million *escudos*, the fact remains that it would not have been able to convert this sum into English pounds at the rate applied by the court, since selling such large amount of *escudos* would have depressed their price. However, under the English rule, which holds the time of the wrongdoing determinative of the rate of conversion,⁴⁰ the bank collected the equivalent, in pounds, of the *escudos* at the rate prevailing at the date of the wrongdoing; it thus also achieved a gratuitous protection of the sum awarded against the depreciation of the *escudo*, a depreciation effectuated by the bank itself.

One cannot help concluding that the reasons advanced by the members of the highest English court were not very convincing. The court did not clearly appreciate the core of the controversy, that is, the restrictions laid upon a central note institute in the use of its notes, with their corollaries with respect to the valuation problem. The question whether the loss in discounts was not the limit of the bank's damage was not even touched upon. This criticism rather applies, although in somewhat lesser degree, to the opinions of the dissenting judges. There is still another side to the case. A foreign bank had brought a suit against an honest and reputable English firm for an amount sufficient to break a firm of the highest financial standing. The merits of the foreign bank's case were by no means clear. England's highest authority on the commercial law, Lord Justice Scrutton, had decided

them for a contraction of the currency. This the bank did not do. Kisch, *op. cit.*, at 230, 238. The government, having compensated the bank for the injury suffered by the expansion of the issuance power, had been subrogated to the bank rights to the yield of the lawsuit, just as it appropriated the yield out of the liquidation of the swindlers' bank. No doubt as to the intentions of the bank and the government could exist had the government, in terms, guaranteed the bank. This, a letter of the government to the bank declined to do. But, according to a record of the bank board of directors (Kisch, *op. cit.*, at 232) "the governor (of the bank) said that as representative of the State, this was not precisely the opinion of the State and he, the governor, was in agreement with the government". The record is perhaps more surprising than the fact recorded.

⁴⁰ *Infra*, sec. 33 II.

against it. Nevertheless, the majority of the House of Lords turned the scale in its favor. This is a splendid example of entire impartiality. As such, it is, perhaps, even more gratifying than a judgment which is only juridically accurate.

SECTION 9

BANK DEPOSITS

I. Definition and Legal Nature

A bank deposit, in the phraseology of modern banking,¹ may be defined as a crediting to a person by a bank of a sum of money upon his making payment to the bank or upon an equivalent act, the intent being primarily to have the sum kept safe and ready for the use of that person. "Payment" presupposes a transfer of ownership in the money to the bank, and the main instances of "equivalent acts" are the crediting of collected checks or of other commercial papers and the opening of credits.² Hence, the original concept of "deposit", requiring a bail of individual goods, has been abandoned in the term "bank deposit". Leaving the money with the bank with the intention of safekeeping is understood as a "deposit" in a very broad sense of the word.³

¹ In England the term "bank deposit" is sometimes understood to mean time deposits only. *In re Collings*, [1933] Ch. 920 (Ch., 1933).

² "A depositor is one who delivers to, or leaves with a bank money, or checks, or drafts, the commercial equivalents of money, subject to his order, and by virtue of which action, title to the money passes to the bank." *Kidder v. Hall*, 113 Tex. 49 at 56, 251 S.W. 497 at 499 (1923).

³ For particular legislative purposes, special definitions may be chosen. The *Federal Deposit Insurance Act* of 1935, 49 Stat. 684, 12 U.S.C. 264(c)(12), in order to attain the comprehensive objectives of the law, includes in the term deposit "the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit" as well as certain trust funds. The original bill, more closely conforming with common notions, read "give unconditional credit". *Hearings before the Committee on Banking and Currency, House of Representatives, 74th Cong., on H.R. 5337. The Federal Reserve Act of 1913*, sec. 16, 38 Stat. 251 at 266, 12 U.S.C. 413, providing for certain reserves to be held against deposits, formulated no definition, but left the task to the Federal Reserve Board (now "Board of Governors of the Federal Reserve System"). An international definition which, however, is not universally applicable is contained in the German-Russian treaty of August 27, 1918 (*R.G.BI.* 1918, 1153 at 1180) where *Bankguthaben* are interpreted as "mature debts held against banks and monetary institutions". Delineations of the bank-deposit concept are mostly undertaken in discussing the distinction between deposit and loan, *infra*.

Therefore, an ordinary bank account constitutes a debt of the bank to the depositor. To the extent that the deposit was created by payment, the money becomes the bank's asset which the bank may use as it pleases,⁴ except for statutory restrictions. No corporeal execution on the money will lie in favor of the judgment creditor of the "depositor" (i.e., of the holder of the credit).⁵ The latter has only a chose in action frequently called a "bank credit" (or "bank account"), and in the case of the bank's insolvency he will not be a privileged creditor.⁶ Only in a broad and non-technical sense may the relationship of the depositary bank to the depositor be considered a fiduciary one. No trust proper nor bailment is involved. The contrary view would lay an unbearable burden upon banking business.⁷ "Special deposits", involving bailments or, in American practice, trust-like relationships,⁸ are outside the scope of the present discussion.

A bank deposit is not a loan to the bank. "A loan is primarily for the benefit of the bank, a deposit is primarily for the benefit of the depositor."⁹ The distinction was well known

⁴ 5 Michie, *The Law of Banks and Banking* (1932) c. 9, secs. 3 and 4b, giving numerous references. Remarkable for its authority and lucidity is *Foley v. Hill*, 2 H.L.C. 28 at pp. 35 to 38, 9 Eng. Rep. 1002 (H. of L., 1848) (L. Ch. Tottenham).

⁵ *National Bank v. Young*, 125 Ill. App. 139 (1905); *Wash v. Hendrick*, 143 Ky. 443, 136 S.W. 883 (1911); *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473 (1933). *Deakman v. Odd Fellows Hall Ass'n of N. J.*, 11 N.J. Misc. 646, 167 Atl. 741 (1933), does not seem to be contrary. A New Jersey statute rendered customary writs of execution good also for the purpose of levying on the rights and credits (in the case at bar, on a bank account) of a judgment debtor. This merely constitutes an extension of the "execution" form and technique to acts which really constitute garnishments.

⁶ *Mobley v. Jackson*, 171 Ga. 434, 156 S.E. 23 (1930); see also *Reichsgericht*, Dec. 2, 1918, *R.G.Z.* 94, 191 at 194.

⁷ See particularly *Foley v. Hill*, *cit. supra*, n. 4.

⁸ See 5 Michie, *op. cit.*, secs. 328 and 332.

⁹ See *Schumacher v. Eastern Bank, etc.*, 52 F.(2d) 925 at 927 (C.C.A. 4th, 1931): "A loan is not subject to check; a deposit ordinarily is. A loan usually arises from the necessities of the borrowing bank; a deposit from the confidence of the depositor in its strength. A loan ordinarily is sought by the bank for its own purposes; a deposit is ordinarily made by the depositor for purposes of his own." This case held that it was *ultra vires* for the bank to give collateral for its deposit, but it was not *ultra vires* to give it for a loan. See also *Leach v. Beazley*, 201 Iowa 337, 207 N.W. 374 (1926); *State ex rel. Spillman v. Nebraska State Bank of Harvard*, 118 Neb. 660, 225 N.W. 778 (1929). The word "loan" when applied in American decisions to bank deposits, ordinarily is intended to differentiate the deposit from a bailment or a trust fund. And this is the real significance of the cases which generally are cited in support of the proposition that a bank deposit is a

in ancient Roman law where the "*depositum irregulare*" was contrasted with the "*mutuum*". The former was not a feature peculiar to banking, but a broad concept applying to fungible things conveyed by the "depositor" to the "depository".¹⁰ As at present special legislative restrictions upon loans did not apply to "irregular deposits".¹¹ Ecclesiastical law was at a later date concerned with this problem, since there was much discussion of the question whether the scriptural prohibition of interest applied to interest allowed by depository bankers.¹² Modern civil law, has on the whole adopted the Roman doctrine.¹³ Recently in the United States the introduction of the federal deposit insurance,¹⁴ which does not apply to loans, has given the distinction between "loan" and "bank deposit" a novel and highly practical significance.

Bank deposits are sometimes included within the terms "cash" or "cash on hand" ("*numéraire*", "*bares Geld*"), par-

loan (5 Michie, *op. cit.*, c. 9, sec. 4a, n. 57.) See, e.g., *Deposit Guarantee Bank v. Merchants' Bank Co.*, 171 Miss. 553, 158 So. 136 (1934). However, in order to effectuate the particular intent of a statute, a bank deposit may be encompassed within the term "loan". *Bank v. Lanier*, 11 Wall. (78 U.S.) 369 (1871) (bank deposit by a bank, with the depository's own stock given as security held invalid as controverting a statute forbidding "any loan or discount on the security of the shares of a bank's own capital stock"). In English law, the distinction between bank deposit and loan apparently is not recognized. It was rejected in *Pott v. Clegg*, 16 M. & W. 321, 153 Eng. Rep. 1212 (Exch., 1847). Pollock, C.B., expressed his doubts as to the equivalence of loan and bank deposit. In that case the statute of limitations in respect to loans was applied to a bank deposit. It is doubtful whether the theory of the case would stand today.

¹⁰ See Girard, *Manuel Élémentaire de Droit Romain* (8th ed., 1929) 564.

¹¹ E.g., the *Senatusconsultum Macedonianum* prohibiting loans to *fili familias*, was not applied to irregular deposits. Girard, *op. cit.*, at 565, n. 1.

¹² See 1 Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtsordnung* (1874) 429.

¹³ It has expressly been set out in the German Civil Code 700. As to French law, see 2 Planiol, *Traité Élémentaire de Droit Civil*, (11th ed., 1935), n. 2213 *et seq.*; on Italian law, 3 De Ruggiero, *Istituzioni di Diritto Civile* (7th ed., 1935) 413.

¹⁴ *Banking Act of 1935*, sec. 101, 49 Stat. 684, 12 U.S.C. 264, discussed in "Legisl.", "Federal Insurance of Deposits" (1936) 36 *Columbia L. R.* 809. Prior to the enactment of federal insurance, systems of deposit guaranty existed in eight of the western states ("Note", 1925 *Federal Reserve Bulletin* 626) under which the distinction between loans and deposits was developed in protracted litigation. E.g., *State ex rel. Spillman v. Nebraska State Bank of Harvard*, 118 Neb. 660, 225 N.W. 778 (1929); *First National Bank v. Hirning*, 48 S.D. 417, 204 N.W. 901 (1925); see 1 Michie, *op. cit.*, c. 1, sec. 43.

ticularly in American accountancy.¹⁵ But the use of the term "cash" in other fields is generally uncertain and varying,¹⁶ and should be avoided in legal phraseology.

II. *The Bank Deposit as Money*

The bank deposit or "bank account" is connected with the money concept first, by its being a "debt", hence an obligation which must be discharged in money. This the bank deposit has in common with any other debt. However, there is another relation between a bank deposit and money peculiar to the former and distinguishing it from an ordinary debt.¹⁷ For a certain extent, bank deposits are themselves dealt with as money. Like money, they serve as stores of value. The depositor "has his money at the bank". The bank is supposed to be safe, able and willing to disburse the money, partly or entirely, at any time on demand, provided there is no stipula-

¹⁵ 1 Kester, *Accounting: Theory and Practice* (3d ed., 1930) 13. Cash (bank deposit) assets should be shown as items separated from other debts, because of their financial property. See Littmann, "*Das Bankguthaben*" (*Beiträge zur Kenntnis des Rechtslebens*), ed. by Arthur Nussbaum, No. 7) (1931) 13.

¹⁶ The question becomes important in a jurisdiction where the labor law forbids the payment of wages to employees in anything but "cash," i.e., a prohibition of the "truck system". N. H. Public Laws (1926), c. 176-26 ("payment of wages shall be made in cash"); N. Y. Labor Law (1935) sec. 195 ("employers shall pay the wages of their employees in cash"); German *Reichsgewerbeordnung* (1900) 115, 116, 117 par. 1, 146 par. 1 (i). Cf. also Ky. Stat. (Carroll, 1930) sec. 4785b-1 (scrip, due bills or checks to be redeemable in cash or legal tender). Such legislation would not seem to prevent payment by remittance upon bank accounts, the prohibition being aimed primarily at compensation by payment in commodities. A fortiori, this conclusion would follow under statutes (e.g., Vt. Pub. Laws (1933) c. 268, sec. 6615) which merely prohibit payment in scrip. The federal Constitution does not prevent the states from making such enactments. See *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901). The model for these statutes, the English *Truck Act* of 1831 (as amended up to 1896), does not employ the term "cash" but rather "current coin of this realm", and requires consent of the employee to payment in bank notes. 1 & 2 Will. IV, c. 37, sec. 8 (1831). In German law the question is significant also outside the labor field. Nussbaum, *Das Geld* (1925) 41. To cite a more recent decision, it was held in a real property case that the term *Barzahlung* used in a contract meant the contrary of taking over a mortgage, and therefore included payment by remittance. Appellate Court Hamburg, March 2, 1925, 25 *Bankarchiv* 81.

¹⁷ The peculiarity of a bank deposit as compared with other debts, is pointed out, e.g., in *Re Hallet's Estate*, 13 Ch. D. 696 at 728 (C.A., 1880).

tion to the contrary.¹⁸ The risk of the bank's becoming insolvent is not too seriously contemplated by the depositor who desires first of all to escape the risk involved in keeping money at home. In "depositing" it with a bank he feels certain that this bank *at this time* is positively trustworthy. This trend has been strengthened in the United States by the federal insurance of banking accounts up to \$5000, making such accounts "fungible" and thereby more money-like. Interest is of secondary concern to the depositor, the interest rate will remain considerably below the loan interest rate. This transformation from corporeal money to a chose in action, so vital in law, is treated as a rather technical occurrence not affecting the identity of the object. Therefore, the bank deposit is visualized as money, and is often included within the meaning of contractual, testamentary and legislative provisions which employ the expression "money".¹⁹

In economics, "deposit currency" is frequently considered as "money" (bank money). This usage has been criticized for good reasons.²⁰ But even though it be accepted, corporeal currency and deposit currency by no means possess identical economic properties and potentialities. Thus, deposit currency may be contracted more easily and has a different velocity of circulation.²¹ In law the difference is basic and palpable.²² The

¹⁸ In *re Banfield's Estate*, 137 Ore. 256, 3 P.(2d) 116 (1931), it was held that a deposit in a bank insolvent at the time of testation would not be included in a bequest of the "money" of the testator.

¹⁹ The confusion which may arise from a *monetization* of bank credits may be illustrated by a decision of the *Reichsgericht*, Nov. 29, 1922, *R.G.Z.* 105, 398. The son of a client of an Egyptian bank had, without any authority from his father, caused the bank to remit a sum, against the father's account and on the father's behalf, to a bank in Germany from which he collected the sum. On a suit brought by the father against the German bank, the Court held the bank liable in the amount of this sum to the plaintiff, because the bank had wrongfully delivered to the son "money" which "economically speaking" belonged to the plaintiff. Still, the Court did not pose the question of whether the Egyptian bank was entitled to charge the father's account with the amount remitted because, for instance, of an inadvertence of the father. In this case "economically speaking" the money would not have "belonged" to the father.

²⁰ See Cannan, *Modern Currency* (1931) 88, emphasizing among other reasons, that bank deposits have not the same effect upon prices as actual currency has. On the other hand, it has been asserted that bank credit even if not based on deposit is "credit money". Reference *Re Alberta Statutes, The Bank Taxation Act, etc.*, [1938] S.C.R. 100 at 156 (Sup. Court of Canada, 1938), *supra*, p. 31, n. 34.

²¹ On velocity of bank deposits, see Kemmerer, *Money* (1935) 52, and Harris, "Exchange Depreciation" (1936) 53 *Harv. Econ. Studies* 286.

²² See *Wheeling Steel Corp. v. Fox*, 298 U.S. 193 at 214 (1936),

fact that analogies exist between money proper and bank deposits is no reason for abandoning the corporeal notion of money, which alone offers a clear cut basis for a juridical doctrine of money. Some rules of money apply to bank deposits. Our task now will be to pursue this process of partial assimilation through the various fields of law.²³

III. Questions of Interpretation²⁴

In Anglo-American law occasions for the interpretation of the word "money" have most frequently arisen in the field of wills. Inaccuracy of testamentary language often forces courts to indulge in unusual interpretations in order to effectuate the real intent of the testator. Thus testamentary references to "money" have been understood to include government and public utility securities,²⁵ and in some instances, even household furniture and domestic animals.²⁶ Consequently, courts have been quick to extend bequests of "money", "ready money", or "cash on hand" to bank deposits,²⁷

where it is emphasized that "money in bank" is an indebtedness.

In *Reichsgericht*, Oct. 14, 1931, *R.G.Z.* 134, 73 at 76, it is pointed out that bank remittances are used as *media of payment* and as *Verkehrsgeld* ("customary money"). However the Court continues: "The legal nature of remittance is as little depicted by this statement as the legal essence of bills of exchange by calling them 'merchant's paper money'." The judgment then applies general contract rules to the remittance. By overstressing the monetary implications of bank deposits one writer suggests that there is no undivided legal doctrine of money; monetary system and debt are, in his opinion, two entirely independent matters. Isele, "*Geldschuld und bargeldloser Zahlungsverkehr*" (1928) 129 *Archiv fuer die civilistische Praxis* 129 at 184. On the historical "bank money" (*mark banco*), see *infra*, sec. 25 IV.

²³ A discussion of the entire law of bank deposits would, of course, be beyond the scope of this volume. We are still less concerned with checks, deposit certificates, pass book and similar bank papers. The constitutional problem in connection with the legislative power of Congress over bank deposits is touched upon *infra*, sec. 18 IV.

²⁴ See (1934) 93 *A.L.R.* 514.

²⁵ *Baldwin v. Baldwin*, 107 N.J. Eq. 91, 151 Atl. 741 (1930); *Charlton et al. v. Carter et al.*, 74 *Rapports Judiciaires de Québec* 34 (*Cour Supérieure*, 1937) (bonds and stock).

²⁶ *McCullen v. Daughtry*, 190 N.C. 215, 129 S.E. 611 (1925); *contra* as to household furniture: *Beit v. Beit*, 98 Conn. 274, 119 Atl. 144 (1922).

²⁷ *Lyons v. Lyons*, 233 Fed. 744 (C.C.A. 4th, 1916); *Beit v. Beit*, 98 Conn. 274, 119 Atl. 144 (1922); *Matter of McKendrie*, 150 Misc. 665, 271 N.Y. Supp. 228 (Surr. Ct. Richmond Co., 1934); *In re Johnston's Estate*, 190 Iowa 679, 180 N.W. 740 (1919); *Baldwin v. Baldwin*, 107 N.J. Eq. 91, 151 Atl. 741 (1930); *In re Banfield's Estate*, 137 Ore. 256, 3 P.(2d) 116 (1931); *McCullen v. Daughtry*, 196 N.C. 215, 129 S.E. 611 (1925). Cf. *Adams v. Jones*, 59 N.C. 221 (1861) (a will directed collection of

and even to time deposits.²⁸ Ultimately, however, the ruling in each particular case will depend on the surrounding circumstances.²⁹

In the interpretation of statutes, a stricter standard should be applied. Since money and bank deposits are, in law, fundamentally different, where the language of a statute is couched in terms of money, it should be presumed that the legislature did not intend to include bank deposits. Certainly this view should prevail where any reasonable ground can be urged in favor of differentiation.³⁰ Thus the authority vested by the German Civil Code 1376 in the husband to dispose of the "money and other consumable goods" of his wife without her consent has not been extended to bank deposits.³¹ Ready money and consumable goods of the wife will ordinarily be available only in very limited quantities; therefore, to stretch a rule, uncommon even under German law, to include bank deposits, would unnecessarily enhance the power of the husband.³²

debts and investments; bank deposits because "commonly regarded as cash" were not included); *Wyatt v. Norris*, 66 W. Va. 667, 66 S.E. 1016 (1912).

²⁸ *Lyons v. Lyons*, 233 Fed. 744 (C.C.A. 4th, 1916); *In re Johnston's Estate*, 190 Iowa 679, 180 N.W. 740 (1919). The English rule is stated in *Mannings v. Purcell*, 7 De G.M. and G. 55, 44 Eng. Rep. 21 (Ch. App., 1855) and particularly *In re Collings*, [1933] Ch. 920 (Ch., 1933), where it is pointed out that time deposits are included in money "in the strict sense of the word". In this case, however, time deposits are termed "bank deposits" as distinguished from "money on current account" (call money). Time deposits were not held to be included in a bequest of ready money in *In re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66 (Ch., 1904); *In re Price, Price v. Newton*, [1905] 2 Ch. 55 (Ch., 1905); *In re Boorer*, [1908] Weekly Notes 189 (Ch., 1908).

²⁹ Thus in *Hancock v. Lyon*, 67 N.H. 216, 29 Atl. 638 (1892), a bequest of money was held not to include a savings bank deposit, the bank being located at some distance and withdrawal being permitted only at certain times and under certain conditions prescribed by the rules of the bank.

³⁰ A different situation, however, prevails under a statute which refers to "money due", as where under a homestead statute exempting from levy and sale real and personal property and excluding from this privilege money, salary or wages due to the debtor, it was held that a bank deposit was not exempt since it fell within the category of money due him. *Morris Plan Bank v. Viona*, 122 Ohio St. 28, 170 N.E. 650 (1930). "Money due" indeed is not tangible money but a debt. The expression "public money", *infra*, n. 42, doubtless includes bank deposits; the existing doubts bear upon the interpretation of the word "public", see 40 *Corpus Juris*, 1494 at sec. 17.

³¹ *Reichsgericht*, Jan. 23, 1922, *J.W.* 1922, 1443. The same applies to savings bank accounts which are of a special character. *Kammergericht* (Appellate Court of Berlin), Oct. 1, 1915, 34 *Rechtsprechung der Oberlandesgerichte* 250.

³² *Reichsgericht*, Jan. 23, 1922, *J.W.* 1922, 1443; *Kammergericht*

IV. *Law of Contracts*

In the law of contracts, bank deposits may be used, through remittances, as a medium of payment. When the payee is credited on his bank account, payment is completed provided he has consented, or ratifies this mode of discharge.³³ As in the case of refusable money, a real payment, not a "*datio in solutum*", is accomplished.³⁴ It has repeatedly been held by both English³⁵ and German courts that payment is

Dec. 5, 1930, *Höchststrichterliche Rechtsprechung* 1931 No. 1139. On this point the writer abandons his views as stated in *Das Geld* (1925) 2 where, however, other examples are taken from the German Codes. A careful examination of the problem is offered by Littmann, "*Das Bankguthaben*" (7 *Beiträge zur Kenntnis der Rechtslebens*, ed. by Arthur Nussbaum) (1931) 19.

³³ Under the theory of the French *Code Civil*, the bank's crediting the account of the payee by substituting the bank as debtor is construed as a "novation", provided the creditor ("payee") clearly has expressed his intention to release the original debtor (Civil Code 1275). However, the French Courts found methods to interpret away this prerequisite which was obviously inappropriate, in banking and even in non-banking situations. *Cour de Cassation*, Dec. 12, 1866, *D.P.* 1867 I 433; Jan. 4, 1888, *ibid.*, 1888 I 37; Jan. 13, 1903, *ibid.*, 1903 I 122; June 10, 1913, *Sirey* 1914 I 143, and Drouillat, *Etude Juridique du Virement en Banque* (thesis Poitiers, 1931) 43.

³⁴ In *Greenweight v. Title Guarantee & Trust Co.*, 1 Cal. (2d) 577, 36 P.(2d) 186 (1934), a bank had agreed to act as escrow agent with authority to cancel a trust deed on receipt of a specified sum of money. When in the course of payment the escrow bank had been credited with the correct amount in its account with the debtor's bank, the trust deed was cancelled. This was approved by the Court, the receipt of the credit being considered an adequate receipt of the money. The transferor, of course, must unconditionally have foregone control on the amount transferred, and must have so intended. See *Davis v. H. S. & M. W. Snyder, Inc.*, 248 Mass. 387 at 392, 143 N.E. 319 at 321 (1924): "The intent of the debtor in writing that letter notifying the creditor of the deposit was material. If it were written with an intent to maintain control over the amount transmitted, then, without regard to the words used to convey the intent to the bank and however they be construed, such intent would deprive the transfer of its effect as payment. To constitute payment the transfer of the money to the creditor or his appointee must be absolute, must leave the debtor without power to take back the money without some authority from the creditor." The question whether a remittance amounts to a real payment becomes relevant in civil bankruptcy law which declares transactions, not in the nature of payments due and accomplished by the debtor within ten days prior to his becoming insolvent, to be voidable. (Particulars omitted) French Commercial Code 446 par. 3; German Bankruptcy Act (*Konkursordnung*) 30 n. 2. In accord with the theory of the text are 1 Jaeger, *Konkursordnung* (6th ed., 1931) 589, and Drouillat's thesis cited *supra*, 76. However, Appellate Court of Montpellier, March 16, 1866, and *Cour de Cassation*, March 19, 1867, *D.P.* 1867 I 384, seem to hold to the contrary.

³⁵ *Bolton v. Richard*, 6 Term. Rep. 139, 101 Eng. Rep. 477 (K.B., 1793); *Bodenham v. Purchas*, 2 B. & Ald. 39, 106 Rep. 281 (K.B., 1818).

complete once the bank has made the entry on the creditor's account rather than at the time the creditor is notified of the entry.³⁶ Although under this theory an internal and revocable act of bank bookkeeping is decisive of the relations between creditor and debtor, the German-English solution seems to be preferable to others suggested.³⁷ The problem is not particularly important in Anglo-American countries, where bank accounts are nearly always disposed of by means of checks or other commercial paper, and not by simple remittances.³⁸

The differences in financial habits have their repercussions in law. German firms, professional men, and even non-business people customarily indicate their bank of account on their stationery, in directories, *etc.* Public information of this or of a similar type amounts to a general consent to payments being made through remittances on the bank account indicated.³⁹ The general proposition that the consent of the creditor may be inferred from previous conduct, public or private, is, of course, also true in Anglo-American law.⁴⁰

³⁶ Leading *Reichsgericht*, April 25, 1903, *R.G.Z.* 54, 329. Ascertainment of the time of the entry may be particularly important where payment must be made within a definite time. *Reichsgericht*, March 19, 1913, *ibid.*, 82, 95, and April 21, 1926, *J.W.* 1926, 1562, where the time had been prescribed by the Court.

³⁷ For a thorough discussion of the subject matter, see 4 Düringer-Hachenburg, *Handelsgesetzbuch* (1932) 914, with ample German references. French literature on transfer of bank credits ("*virement*") is amazingly meagre. See 4 Lyon-Caen & Renault, *Traité de Droit Commercial* (5th ed., 1925) 628; 2 Lacour et Bouteron, *Précis de Droit Commercial* (3d ed., 1925) No. 1411. A valuable dissertation on the subject matter is offered by Drouillat, in his thesis *cit. supra*, n. 33. He, however, does not sufficiently separate the pure crediting process from crediting by collecting a check which presents an entirely different legal problem. The latter situation cannot be discussed in the present volume.

³⁸ For an explanation of this disparity, see 3 *Encyclopedia of Social Sciences* 362 (1930); Spahr, *The Clearing and Collection of Checks* (1926) 20; Kenley, *Clearing House and Credit Instruments* (1911) 207.

³⁹ *E.g.*, *Reichsgericht*, Jan. 4, 1924, 78 *Seufferts Archiv* 296; Appellate Court of Frankfurt, Oct. 24, 1921, *J.W.* 1922, 511. In *Reichsgericht*, Oct. 25, 1892, 37 *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* 919, however, it has been held that the creditor is entitled to reject a payment made by remittance on his bank account. A public declaration of the creditor, implying his willingness to receive payments in this way, was not referred to in the case. Still more reserved as to the discharging effect of remittance was the Appellate Court of Brussels, June 28, 1922, 1 *Revue du Droit Bancaire* 534.

⁴⁰ American courts have held that an objection by the creditor against a payment by remittance upon his account must be specific and timely. *Beranek v. Beranek*, 95 Neb. 311, 145 N.W. 712 (1914); *Smith v. Lobb*, 33 Cal. App. Rep. 790, 166 Pac. 1026 (1917); *Davis v. H. S. & N. W. Snyder, Inc.*, 248 Mass. 387, 143 N.E. 319 (1924).

Another diversity between common law and civil law bank deposits lies in the fact that the Anglo-American concepts of the constructive trust⁴¹ and of "public moneys" (preferential deposits by governments, their agencies and their subdivisions)⁴² do not exist in civil law. An English

⁴¹ As to constructive trusts, see *supra*, p. 56, n. 13. The doctrine of constructive notice, preventing the assumption of *bona fides* (4 Bogert, *Trust and Trustees* (1935) secs. 912, 913) may be particularly troublesome. The *Uniform Fiduciaries Law* which requires actual notice, has been adopted by only 15 states (not by New York).

⁴² The courts have approached this problem in three ways: (1) to grant a preference to the state as to "state funds" on a theory of sovereign prerogative; (2) to grant a preference, apart from sovereignty, on the theory that a depositary becomes a trustee *ex maleficio* where it accepts public funds without full compliance with the depositary laws; (3) to refuse to subrogate a surety of public funds to the state's preferences, or readily to find a waiver thereof. The basis of (1) *supra*, is closely related to the common law theory on the royal prerogative to the effect that the crown was preferred when its claims conflicted with those of equal rank. *Quick's Case*, 9 Coke Rep. 129 at 129 (b), 77 Eng. Rep. 916 at 917 (Court of Wards, 1611); *Magna Charta*, sec. 26 (1215) [sec. 18 (1225)]; 25 Edw. III st. 5, c. 19 (1350). The courts in this country have split on whether the prerogative rights of the Crown were "received" by the state. Compare, e.g., *Marshall v. New York*, 254 U.S. 380 (1920); *Green's Estate*, 4 Md. Ch. 349 (1848); *United States Fidelity and Guarantee Co. v. Rainey*, 120 Tenn. 357, 113 S.W. 397 (1908), with *North Carolina Corporation Commission v. Citizens Bank and Trust Co.*, 193 N.C. 513, 137 S.E. 587 (1927); *Henry v. Alexander*, 131 Miss. 588, 94 So. 846 (1923). See Crane, "Royal Prerogative in the United States", (1928) 34 W. Va. L.Q.R. 317. The problem of priority of governmental agencies and subdivision as to public funds has become most acute where general deposits have been made in banks which subsequently became insolvent. In the latter cases, particularly since 1929, the tendency has been to deny the "reception" of the prerogative right (*Fry v. Equitable Trust Co.*, 264 Mich. 165, 249 N.W. 619 (1933); *Board of County Commissioners of San Miguel v. McFerson*, 90 Colo. 408, 9 P.(2d) 614 (1932)), or, if admitting it, to limit its effect [see (1934) 47 Harv. L.R. 841 at 842-3; (1927) 12 St. Louis L.R. 196 at 197], and particularly not to extend it to political subdivisions, such as cities, counties, school districts, etc. See *People ex rel. Nelson v. Home State Bank*, 338 Ill. 179, 170 N.E. 205 (1930); *County Court v. Matthews*, 99 W. Va. 483, 129 S.E. 399 (1925); *Glynn County v. Brunswick Terminal Co.*, 101 Ga. 244, 28 S.E. 604 (1897). But cf. *City and County of Denver v. Stenger*, 295 Fed. 809 (C.C.A. 8th, 1924). Federal moneys are given priority by 31 U.S.C. 191 (based upon Act of March 3, 1797 sec. 5, 1 Stat. 512 at 515), except where a national bank is the depositary. *Cook County National Bank v. U. S.*, 107 U.S. 445 (1885).

The second approach, the theory of trust *ex maleficio*, has in fact been most frequently applied to political subdivisions. See, e.g., *Grand Forks County v. Baird*, 54 N.D. 315, 209 N.W. 782 (1926); *State v. Bruce*, 17 Idaho 1, 102 Pac. 831 (1909); though the theory has been that the public title has not been divested by the unauthorized deposit, a recent tendency to restrict this doctrine has arisen. (1934) 47 Harv. L.R. 841 at 845; cf. *Polk County v. Farmer's State Bank of Bolivar*, 336 Mo. 1129, 82 S.W. (2d) 577 (1935).

As to the subrogation of a surety, although a bare majority of the courts have permitted it (Hanna, *Cases and Materials on Security* (1932) 396), courts have increasingly found a waiver of the preference, by the statutory requirement of a bond (*Nat. Surety Co. v. Piaton*, 60 Utah 289, 208 Pac. 878 (1922); *Shaw v. United States Fidelity and Guaranty Co.*,

or American bank must, because of these concepts, expect possible privileged claims by third persons who are not successors to the depositor. In civil law, there is equality among the depositors and the bank can rely much more on the fact that the depositor is its exclusive creditor.⁴³ Therefore, bank accounts are legally more uniform and unambiguous, and to this extent more money-like in civil law.

Protection of *bona fide* acquisition has not been extended to bank credits.⁴⁴ When, for instance, X, a client, is credited through inadvertence or mistake of the bank, on the order of X's debtor who in fact had no funds with the bank, the credit is subject to cancellation by the bank. The approach is different in the various legal systems.⁴⁵ Under Anglo-American law there is no contract in such a situation,⁴⁶ the bank having been given no consideration by X.⁴⁷

48 S.W. (2d) 974 (Tex. Comm. App., 1932); *Maryland Casualty Co. v. Rainwater*, 173 Ark. 103, 291 S.W. 1003 (1927); cf. *State ex rel. Rankin v. Madison State Bank*, 68 Mont. 342, 218 Pac. 652 (1923)) and by the receipt of interest on state deposits, *National Surety Co. v. Morris*, 34 Wyo. 134, 241 Pac. 1063 (1925) [views which of course hit the preference of the government itself]. Therefore the cases in the main seem to justify the conclusion that the tendency is to confine and diminish the preferred position accorded public funds. English law accords the Crown priority over other creditors of equal degree with respect to Crown moneys regardless of whether the agency depositing the money was acting under authority or wrongfully. *In re West London Commercial Bank*, 38 Ch. Div. 364 (1888); *Rex v. Wrangham*, 1 Cr. & J. 408, 148 Eng. Rep. 1481 (Exch., 1831); *Rex v. Adams and Warren*, 2 Exch. 299, 154 Eng. Rep. 506 (Exch., 1848); *Rex v. Ward*, 2 Exch. 301, 154 Eng. Rep. 507 (Exch., 1836).

⁴³ The latter point is discussed as to German law, with references to other legal systems by G. Littmann, "*Das Bankguthaben*" (7 *Beiträge zur Kenntnis des Rechtslebens*, ed. by Arthur Nussbaum) (1931) 23.

⁴⁴ In *Stephens v. Board of Education*, 79 N.Y. 183 (1879), the application, in favor of the creditor, of the rule "money has no earmark" does not refer to the credit as such but to the money paid out against the credit by the bank. See also *Hatch v. Fourth National Bank*, 147 N.Y. 184, 41 N.E. 403 (1895), and *Nassau Bank v. National Bank of Newburgh*, 159 N.Y. 456, 54 N.E. 66 (1899).

⁴⁵ As to French law, see Drouillat, *op. cit. supra*, p. 106, n. 33, at 160, referring to Appellate Court of Paris, Feb. 14, 1832, *Sirey* 1833 II 623, which, however, does not exactly meet the situation envisaged above. At any rate, the bank would be protected by the doctrine of "non-existent cause", 2 Planiol, *Traité Élémentaire de Droit Civil* (11th ed., 1935) no. 1026, *et seq.* The *Reichsgericht*, March 20, 1914, *Monatsschrift fuer Handelsrecht und Bankwesen* 1914, 152, while recognizing the existence of an "abstract" contract between B and the Bank, held good a "recoupment" by the bank of the debt incurred, B having been "unjustly enriched" by that contract. German Civil Code 811 par. 2.

⁴⁶ "It requires no lengthy citation of authority to establish that a bank is not liable for the amount of a credit given for a deposit when in fact no such deposit was made." *American National Ins. Co. v. Marine Bank and Trust Co.*, 167 La. 153, 118 S.E. 871 at 872 (1928). Accord: *West Frankfort Bank and Trust Co. v. Barretti*, 206 Ill. App. 261 (1917);

It may be noticed in conclusion that where debts are "re-valued" after a breakdown of the currency, bank deposits will be exempt from revaluation just as well as money proper. This result is inevitable because the assets held against the deposits will consist of money and short-time investments which are not revaluable. The German revaluation law of July 12, 1925 (sec. 66)⁴⁸ explicitly exempts bank accounts ("*Bankguthaben*"). It is remarkable that American law, despite the lack of revaluation theory, reached the same result in the case of the vanished confederate currency by another approach. While in general, contractual debts in confederate currency were converted at the value at the time of contracting—a rule amounting to revaluation⁴⁹—bank deposits were converted at the value on the day of demand, which practically amounted to a refusal of revaluation.⁵⁰

V. *Taxation*

In the field of tax law, the concepts of "money" and "bank deposits" are frequently employed. The ephemeral and largely accidental nature of most of those provisions precludes closer examination within the scope of this volume.⁵¹ In general, the interpretative rule of money, suggested above⁵² should be applied in tax law, since technically accurate language as to

5 Zollman, *Banks and Banking* (1936) sec. 3374. However, in view of the intricate controls which modern banking bookkeeping provides, too great a lapse of time before discovery of the mistake may destroy the bank's right to recovery after withdrawal. Cf. *McCannon v. Tolfree*, 227 Mich. 15, 198 N.W. 197 (1924), with *West Frankfort Bank and Trust Co. v. Barretti*, *supra*. Similarly, a depositor claiming non-entry of a deposit actually made, must within a reasonable time after receiving his bank statement report the error. *Farmers' Bank and Trust Co. v. Boshears*, 148 Ark. 589, 231 S.W. 10 (1921).

⁴⁷ Whether a depositor who expects a credit and reasonably acts in reliance on the bank's mistaken credit will be protected has not been decided by the courts. Nor will section 90 of the *Restatement of Contracts* (1932) aid unless "injustice can be avoided".

⁴⁸ *Infra*, sec. 23 III.

⁴⁹ *Infra*, sec. 24 I.

⁵⁰ *Henry & Co. v. Northern Bank of Alabama*, 63 Ala. 527 at 539 and 546 (1879), referring to *Planters' Bank v. Union Bank of Louisiana*, 16 Wall. (83 U.S.) 483 (1873), where the same result was reached by an application of a different theory (confederate money as commodity).

⁵¹ For some pertinent questions of German tax law, see Littmann, *op. cit. supra*, n. 43, at 8.

⁵² P. 105.

typical taxable things is certainly to be expected.⁵³ Differences between "money" and "bank deposit" appear as a neat problem in tax jurisdiction, so important in American law. As the law has finally evolved, bank deposits or their transfer may be taxed as intangibles at the domicile of the owner, whereas money proper, as tangible property, can be taxed only by the state of the "situs" thereof.⁵⁴

VI. Procedure

The concept of bank deposits as "money" has even been carried over to the field of procedure; and in one common law jurisdiction at least the action for money had and received was held to lie in a case where the defendant had secured the transfer of a fund from the plaintiff's account to an account in her own name. The court pointed out that the transfer of the deposit was the same "in legal effect as if she had actually withdrawn the money and had redeposited it in her own name".⁵⁵ The holding, however, may not be very significant, since the action for money had and received has generally been given a somewhat extended scope.⁵⁶

⁵³ Thus when taxing statutes distinguish between "money" and "solvent credits", the taxpayer being permitted to deduct debts owed by him only from the second category, bank deposits should be considered as "solvent credits", not as "money". *Roberts v. Lynch*, 56 Utah 346, 190 Pac. 930 (1920). Contra: *Gray v. Street Commissioners of Boston*, 138 Mass. 414 (1885). For the meaning of "solvent credit", see *Stillman v. Lynch*, 56 Utah 540, 192 Pac. 272 (1920). Some states have resolved the controversy by legislative act, thus *N. D. Comp. Laws* (1913), sec. 2074 ("The word 'money' or 'moneys' means gold and silver coin, treasury notes, bank notes and every deposit which any person owning the same or holding in trust is entitled to withdraw as money or on demand.") Similarly *Ohio Gen. Code* (Page, 1926), sec. 5326.

⁵⁴ *Blodgett v. Silberman*, 277 U.S. 1 (1928). Although decided prior to the recent line of Supreme Court decisions invalidating "double taxation" of intangibles (as well as tangibles) by the States, this decision undoubtedly represents the present law of the Court. Cf. *Beidler v. South Carolina Tax Comm.*, 282 U.S. 1 (1930) (an inheritance tax may not be levied by the state of the debtor upon open accounts or credits); cf. (1935) 35 *Columbia L.R.* 1151. Where bank deposits have secured a "business situs", the state of the situs may tax the account, probably to the exclusion of the state of the domicile, *Wheeling Steel Corp. v. Fox*, 298 U.S. 193 (1936); see (1936) 85 *U. of Pa. L.R.* 121.

Even under the Ohio statute, cited *supra*, n. 53, the diversity between money and bank deposit was judicially recognized. *Cleveland and Western Coal Co. v. O'Brien*, 8 Ohio App. 247 (1917), *aff'd* 98 Ohio St. 14, 120 N.E. 214 (1918).

⁵⁵ *Earle v. Whiting*, 196 Mass. 371, 82 N.E. 32 (1907).

⁵⁶ *Barnett v. Warren*, 82 Ala. 557, 2 So. 457 (1887) (action covers property received as the equivalent of money); *Todd v. Bettingen*, 190

Much more important is the question raised by the legal immunity from execution of certain funds of money such as pensions ("pension money"), public moneys, relief moneys and so on. Are these amounts also protected when paid into a bank as a "deposit"? This should be answered in the affirmative since the deposit in this situation is but a substitute, and a customary one, for a definite sum safeguarded by the law; it does not, therefore, warrant nullification of the protection awarded the pensioner or other recipient by the law.⁵⁷ For the bank this immunity entails the abolition of its right of set-off, since the latter would result in invasion of the customer's privilege.⁵⁸ If, however, it is manifest under a statute that only a debt as such is given immunity, payment or remittance of the money due into a bank account creates a new debt not participating in the exemption.⁵⁹

Minn. 493, 124 N.W. 443 (1910) (action covers stock); *Bianconi v. Crowley*, 256 Mass. 187, 152 N.E. 305 (1926) (action applies to credit).

⁵⁷ *Second National Bank of Greenville v. Hoblit*, 41 Ohio App. 126, 179 N.E. 812 (1931) (under federal statute exempting proceeds of loans on adjusted war service certificates); *Stockwell v. National Bank of Malone*, 36 Hun (N.Y.) 583 (1885); *Gaddy v. First National Bank*, 115 Tex. 393, 283 S.W. 472 (1926); *Mobley v. Jackson*, 171 Ga. 434, 156 S.E. 23 (1930). Sometimes immunity is explicitly extended by statute to deposited pension money. *Iowa Code* (1927) sec. 11761, discussed in *Appanoose County v. Henke*, 207 Iowa 835, 223 N.W. 876 (1929). Under German law, a certain money minimum is exempt from execution in case the debtor is a government official or another person privileged by law. *Zivilprozessordnung* sec. 811 (8). When the exempt amount was paid into a bank account, the Appellate Court of Cologne, Dec. 18, 1929, *Recht* 1930 No. 1023, denied the debtor protection; seemingly contra: Appellate Court of Berlin (*Kammergericht*) Aug. 8, 1929, *J.W.* 1930, 3562 (n. 2).

⁵⁸ Where moneys of a public corporation, exempt from seizure, are deposited, the courts are divided as to the validity of a set-off, by the bank, against the claim of the corporation. *Township Committee of Piscataway Township v. First National Bank*, 111 N.J. Law 412, 168 Atl. 757 (1933) (allowing no set-off). *Contra: Board of Drainage Commissioners v. City National Bank*, 231 Ky. 670, 22 S.W. (2d) 94 (1929). *Cf. United States v. Bank of the Metropolis*, 15 Pet. (40 U.S.) 377 at 403 (1841) (although validating the set-off, this case presupposes a special situation; the claim of the bank being derived from commercial papers signed by the U. S.).

The German Civil Code 394 expressly prohibits a set-off against a debt exempt from garnishment, but the rule is of universal application. As to French law, see 2 Planiol, *Traité Élémentaire de Droit Civil* (11th ed., 1935) No. 578, and covering comparative aspects, 5 *Rechtsvergleichendes Handwoerterbuch* (1933) 61 ("Kompensation").

⁵⁹ This should be presumed where under the wording of the statute only a pension (compensation, etc.) "due" is protected. See cases cited by O'Brien, J., dissenting, in *Surace v. Danna*, 248 N.Y. 18, 161 N.E. 315 (1928) (the latter case involving pension due under Workmen's Compensation Statute). The majority of the Court, however, held for the worker, Chief Judge Cardozo writing the opinion which reached a satisfactory result indeed, considering the typical situations coming under

SECTION 10

FOREIGN MONEY

I. *Foreign Money as a Commodity*

A coin or a note functions as money only within the territory in which that currency customarily circulates; outside that territory, the coin or note commonly becomes a commodity.¹ Therefore, foreign money does not fall within the rule protecting *bona fide* acquirers except that foreign bank notes would come under the rule governing negotiable instruments. Nor is there, at least in respect to foreign coin, a reasonable justification for extraordinary protection,² since there is no public policy fostering its circulation,³ and since it is much easier to identify than domestic money. Where foreign currency is bought with, or sold for, domestic money a real sale takes place; there is neither a barter nor a simple exchange of money for money.⁴ Therefore, where a counterfeit

a Workmen's Compensation Act. The problem of the *Morris Plan Bank* case, *supra*, p. 105, n. 30, is different; no transformation of a pension or similar grant through the depositing process was involved here. An English case restricting protection to the pension not yet paid is *Jones Co. v. Coventry*, [1909] 2 K.B. 1029 (K.B., 1909) (army pension). Protection was granted in an analogous situation by the Appellate Court of Berlin, August 8, 1929, *J.W.* 1930, 3562; Appellate Court, Munich, Dec. 20, 1929, 29 *Jahrbuch des Deutschen Rechts* 994. The Berlin Appellate Court, June 16, 1931, *J.W.* 1932, 183, held, however, that credits on a postal check account (of the deposit and check service of the German mails) can be garnished irrespective of the immunity of the original debt.

¹ This rule has frequently been announced by the courts. See, e.g., *Leavitt v. de Launy*, 4 N.Y. 363 (1850); *Gross v. Mendel*, 171 App. Div. 237, 157 N.Y. Supp. 357 (1916), *aff'd* 225 N.Y. 633, 121 N.E. 871 (1918); *S.S. Celia v. S.S. Volturro*, [1921] 2 A.C. 544 at 563 (H. of L., 1921); *Richard v. American Union Bk.*, 253 N.Y. 166, 170 N.E. 532 (1930); *Anglo-Continental Treuhand A.G. v. St. Louis S.W. Ry.*, 81 F.(2d) 11 (C.C.A. 2d, 1936); Appellate Court of Hamburg, Oct. 12, 1920, 41 *Rechtsprechung der Oberlandesgerichte* 214. A contract to sell foreign money has been held to be a sale of goods subject to the Sales Act. *Reisfeld v. Jacobs*, 107 Misc. 1, 176 N.Y. Supp. 223 (1919); *Melzer v. Zimmerman*, 118 Misc. 407, 194 N.Y. Supp. 222 (1922), *aff'd* 205 App. Div. 886, 198 N.Y. Supp. 932 (1923).

² In *Brown v. Perera*, 176 N.Y. Supp. 215 (1918), the referee, with a great show of learning and marshalling of vast material, tries to justify the opposite theory, ignoring, however, the obvious diversities in the social significance of domestic and foreign money.

³ The circulation of any evidence of debt issued by a bank and payable in foreign money is prohibited and punishable under N. Y. *Banking Law* sec. 142 and N. Y. *Penal Law* sec. 298.

⁴ *Infra*, sec. 32 at n. 11. Contrariwise, national money, traded in abroad, has to be treated as commodity. In *Reichsgericht*, Jan. 3, 1925, *J.W.* 1925, 1986, a German bought German marks in Luxemburg with francs. Revaluation of the claim for marks was denied because of its non-pecuniary character. See the annotation by this writer.

foreign money note (or coin) is delivered on such a transaction, the law of sales is controlling. The rule "caveat emptor" does not apply since the purchaser did not receive a mere defective note but rather a scrap of paper.⁵ Inspection and notice of counterfeit, however, must be made within a reasonably short time.⁶ Even if the seller of the counterfeit note acted in good faith the purchaser has the choice of recovering either the price paid by him, if he rescinds, or the value of the note at the time of the breach of contract, *viz.*, at the time when the foreign currency was to be delivered.⁷ And while in the case of a domestic currency debt the creditor, upon a breach of contract, is merely entitled to interest, he may sue for the difference in market prices where his debtor breaches a contract calling for the delivery of foreign currency.⁸ Again the rule has been laid down that import and export regulations regarding "merchandise" apply to foreign money; and during the years following the World War, statutory prohibitions of the import of "merchandise" without a license were used to bar the influx of Russian rouble notes.⁹ However, foreign

⁵ This fact would clearly constitute a "failure of consideration". A similar situation exists where a bill or note is sold and turns out to be invalid because of forgery or other reasons. *Meyer v. Richards*, 163 U.S. 385 (1896); *Terry v. Bissell*, 26 Conn. 23 (1857); *Aldrich v. Jackson*, 5 R.I. 218 (1858). Cf. *Uniform Negotiable Instruments Law*, secs. 23, 65. See generally 2 Williston, *Sales* (2d ed., 1924) sec. 600; Clark, *Contracts* (4th ed., 1931) 644. Under civil law, the rules limiting the seller's liability with regard to defective delivered goods likewise cannot apply to counterfeit foreign money. *Reichsgericht*, Sept. 23, 1922, *J.W.* 1923, 176; Austrian Supreme Court, June 28, 1921, 4 *Die Rechtsprechung* 79; and for the case of a payment made in counterfeit notes, same court, Feb. 22, 1921, cited by Lobl, 4 *ibid.*, 55 at 56.

⁶ To this extent the rules on counterfeit payments, *supra*, p. 61, apply; *Curcier v. Pennock*, 14 Serg. & R. (Pa.) 51 (1826). A special burden is even placed upon the payee to use reasonable means of ascertaining the genuineness of foreign money before accepting it. *Rasst v. Morris*, 135 Md. 243, 108 Atl. 784 (1919). The Appellate Court of Hamburg, in the case cited *supra*, n. 1, dismissed a vendee's claim on the ground that a ten-day period stipulated by contract had elapsed. At the same time the Court pointed to the frequency of commercial customs requiring observation of such periods. As a matter of fact, large amounts of counterfeit foreign notes, chiefly dollar notes, were traded and hoarded in the European countries in the years following the World War. In the case of counterfeit Federal Reserve notes sold in Germany to a German bank, the *Reichsgericht*, May 28, 1924, *R.G.Z.* 108, 279, denied the latter's claim because the sale involved only specific notes. This is clearly unsatisfactory.

⁷ 2 Williston, *Sales* (2d ed., 1924) secs. 600, 656.

⁸ See *Richard v. American Union Bank*, 253 N.Y. 166, 170 N.E. 532 (1930).

⁹ Appellate Court of Paris, May 30, 1921, *Sirey* 1921 II 89; *Reichswirtschaftsgericht*, March 19, 1921, *J.W.* 1921, 651; Dec. 2, 1922, *ibid.*

money as such is not a "security". This has practical importance in the field of taxation where "securities" are in many respects subject to special regulations.¹⁰

The treatment of foreign money as a commodity is subject to important qualifications. In respect to the punishment of counterfeiting and of similar crimes, foreign money is, by a fairly universal rule, dealt with much like the national money.¹¹ And a debt contracted for in foreign currency should be held a "monetary" obligation, particularly where the country of origin of that currency is the place of payment.¹²

Moreover, certain types of foreign money may be incorporated into the national monetary system. They may even be made legal tender. The currencies of the American colonies consisted largely of foreign coins.¹³ In the sixteenth century certain French and other gold coins were recognized in England as legal currencies.¹⁴ In more recent times, American gold coins have been made legal tender in Canada,¹⁵ one American dollar being equivalent to one Canadian dollar. Similarly, the English sovereign was made legal tender in Switzerland in 1870,¹⁶ in Argentine in 1887,¹⁷ and in India in 1893.¹⁸ In 1918, Mexico conferred that privilege on American and a number of other foreign gold coins.¹⁹ Such measures are intended to correct a scarcity in domestic coin. Incorporation into the domestic system may also be accomplished by impart-

1924, 726; as to customs: Criminal Court of Avesnes, Dec. 9, 1924, *D.H.* 1925, 94. *Contra*: *Reichsgericht*, July 14, 1921, *J.W.* 1922, 168. The Avesnes case turns on English pound notes.

¹⁰ See *infra*, sec. 11 V.

¹¹ *Supra*, p. 33.

¹² *Infra*, sec. 32 I.

¹³ *Infra*, sec. 15 III.

¹⁴ Feavearyear, *The Pound Sterling* (1931) 44, see also *Ward v. Ridgwin*, Latch 84, 82 Eng. Rep. 286 (1625). For a similar event during the XVII century, see 4 Holdsworth, *A History of English Law* (1924) 297.

¹⁵ Tate's *Modern Cambist* (28th ed., 1929) 505. It may, furthermore, be mentioned that American gold and silver coins, up to 1935, have been legal tender in the British West India colonies, Order in Council, Nov. 9, 1935, 1935 *Statutory Rules and Orders* 216.

¹⁶ Blaum, "Das Geldwesen der Schweiz" (*Strassburger Abhandlungen* no. 24 (1908)) 108.

¹⁷ *Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co.*, 10 Lloyd's L.R. 703 (H. of L., 1922) pointing out that despite this Argentine rule "pounds" payable in Buenos Aires did not mean sovereigns. Same: *Ellawood v. Ford and Co.*, 12 *ibid.* 347 (K.B., 1922) and *Williams and Mordey v. Muller and Co., Ltd.*, 18 *ibid.* 50 (K.B., 1924).

¹⁸ See *infra*, p. 140, n. 23.

¹⁹ Decrees of May 14, 1918, *Diario Oficial* 1918, 171 and 172.

ing public receivability to foreign coin, as was done by the Latin Monetary Union in respect to Union coins of member countries.²⁰ Finally, foreign money may become current in a certain territory without any governmental assistance, the chief illustration being the circulation of foreign coin in frontier districts.²¹ This is further evidence against a "state theory" of money. In all of these situations, what was primarily foreign money has become domestic money; in the third case, of course, only within the frontier district.

II. Trading in Foreign Money

In continental countries, up to the middle of the nineteenth century, trading in foreign money was an independent and very important branch of business. From the sixteenth century on, the variety and defectiveness as well as the inter-local and international migration of coin, manufactured by innumerable rulers, created indescribable confusion which rendered money changing a lucrative trade.²² Later, with the establishment of national currencies and the concomitant unification of circulating media, the need for money changers diminished, and their activities became merged with the general banking business, particularly since customers were increasingly supplied with foreign money by means of checks and wireless transfers.²³ In the continental commercial codes money changing still appears as an independent form of commerce, distinct from banking, but this no longer reflects existing conditions to any appreciable extent;²⁴ so that in Europe

²⁰ *Infra*, sec. 14 I.

²¹ Leventritt, Referee, in *Brown v. Perera*, 176 N.Y. Supp. 215 at 227 (1918).

²² See Endemann, *Studien in der Romanisch-Kanonistischen Rechts- und Wirtschaftslehre*, Vol. I (1874) 102, 190; Vol. 2 (1883) 200. These brilliant discussions are primarily concerned with the Italian money changers (*campsores*) and with the attitude of ecclesiastic law to their activities. The business of the *campsores* had early developed to great importance.

²³ As is well known, the use of drafts, to transfer money abroad, goes back to the middle ages. See, e.g., 1 Endemann, *op. cit.* 81. However, with regard to drafts also new ways were opened through organization and centralization, particularly by the cooperation of the Central Note institutes.

²⁴ French Commercial Code 632; German Commercial Code 1(4); The Italian Commercial Code 3(12) seems primarily to bear upon the draft business, see preceding note.

today dealing in foreign exchange has simply become a branch of banking. The same is true in the United States, although it was not without some difficulty that American courts finally recognized such transactions as a legitimate part of corporate banking.²⁵

III. "Cable Transfers" and "Letters of Delegation"²⁶

The supply of money abroad is ordinarily provided by banks through bills of exchange, checks or cable transfers sold to clients. Bills of exchange and checks, being negotiable instruments, are outside the scope of the present volume. A few words may be said about cable (wireless) transfers. They have been judicially described as a contract by which a banker "in consideration of the money paid to him will create a credit for a given person of a given amount of the desired foreign money at a given place through orders dispatched by wireless and confirmed by mail to somebody who will obey his directions in setting up the credit".²⁷ The idea of one court,

²⁵ *Webber v. American Union Bank*, 221 App. Div. 94, 222 N.Y. Supp. 359 (1927) (reversing a judgment of the lower court, which declared unlawful the crediting, by a bank, of its client for an amount in foreign currency against the payment of dollars, and the issuing of a "Special Deposit Book" for the amount of foreign currency). The correct view is advanced in *Federal Trust Co. v. State Bank*, 241 Mass. 572, 135 N.E. 879 (1922) and, as to trust companies, in *Gerold v. Cosmopolitan Trust Co.*, 245 Mass. 259 at 261; 139 N.E. 624 (1923). In order to safeguard inexperienced immigrants against fraud, an act of New York forbids any person or corporation unless authorized, to do business as an agent for any steamship company, express company or banking institution for the purpose of receiving money for transmission abroad by draft, money order or otherwise. Steamship and express companies are prevented from receiving money as depositaries, but must transmit the money within a stated number of days. *N. Y. General Business Law* secs. 160-166. In Illinois, trading in foreign exchange by non-banking enterprises must be licensed and is subject to certain governmental regulations. *Ill. Revised Statutes* (1935) c. 17b, sec. 1. *Italia-America Shipping Corp. v. Nelson*, 323 Ill. 427, 154 N.E. 198 (1927), held the statute constitutional.

²⁶ The law on cable transfers (in German: *Auszahlungen*) has been extensively treated in continental legal writings. See Nussbaum, *Das Geld* (1925) 256; H. Rosenthal, "Die Auszahlung" (*Beiträge zur Kenntnis des Rechtslebens*, ed. by Arthur Nussbaum, No. 5) (1927); Ott, *Devisengeschäfte nach Schweizerischem Recht* (1924); less comprehensive is Mater, *Traité Juridique de la Monnaie et du Change* (1925) 336. See also Minty, *The Law Relating to Banking and Foreign Exchange* (1936) 279; 6 Michie, *The Law of Banks and Banking* (1933) 234; 7 Zollmann, *Banks and Banking* (1936) 243; Stone, "Some legal problems involved in the transmission of funds", (1921) 21 *Columbia L.R.* 507; Fraenkel, "Some aspects of the law relating to foreign exchange", (1920) 20 *Columbia L.R.* 832.

²⁷ *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 139 N.E. 766 (1923).

that the bank forwards the foreign money like a "trunk" shipped by a common carrier, is, of course, naive.²⁸ The bank, having received domestic money (the "purchase" price) from the client, will use this money to procure foreign exchange to be delivered abroad by a correspondent bank on behalf of the "selling" bank. Although the expressions "sale" and "purchase" of a cable transfer are customary in American and foreign business life, there is hardly a sale in the legal sense. No specific money, of course, and no right of action against a third person is transferred to the "purchaser". Payment in foreign money will be made by the foreign bank, but this does not amount to an assignment of a pre-existent chose in action. No actionable right against the foreign bank is ordinarily acquired by the client or by the payee except in those American jurisdictions which consider the foreign bank a direct agent of the client;²⁹ there need not even exist, at the time of the payment, a credit of the selling bank with the foreign bank.³⁰ While a "purchase" doctrine has repeatedly been followed by American and other courts, an "agency" theory, which prevails in German courts and has been used to a certain extent in this country,³¹ would seem preferable, pro-

²⁸ See *Strohmeyer & Arpe v. Guaranty Trust Co.*, 172 App. Div. 16, 157 N.Y. Supp. 955 (1916), discussing and reversing the judgment of the court below.

²⁹ American courts have split sharply as to whether the correspondent bank becomes a direct agent of the client or merely a sub-agent liable only to the transmitting bank. Many courts hold the first bank responsible for the negligence of its correspondent, no privity existing between the latter and the client. Others refuse to impose liability upon the first bank and instead grant to the client a direct action against the correspondent bank. *E.g.*, *Nicoletti v. Bank of Los Banos*, 190 Cal. 637, 214 Pac. 51 (1923), and authorities there cited; see also Note, "Duty and liability of bank under agreement to remit money", (1923) 27 A.L.R. 1488; 1 Morse, *Banks and Banking* (6th ed., 1928), c. 17; 7 *Corpus Juris* 606.

³⁰ See *Legniti v. Mechanics and Metals Nat. Bank*, 230 N.Y. 415, 130 N.E. 597 (1921). The *Statute of Frauds* therefore cannot apply to cable transfers, even if it is extended by state legislation to "choses in action". *Equitable Trust v. Keene*, 232 N.Y. 290, 133 N.E. 894 (1922), reversing 195 App. Div. 384, 186 N.Y. Supp. 468 (1921). The fact that the bank did not always have foreign exchange sufficient to cover its outstanding obligations does not make the transaction illegal. *Corsino v. Hanover Trust Co.*, 253 Mass. 5 at 7, 147 N.E. 868 (1925).

³¹ In favor of the purchase doctrine: *Strohmeyer & Arpe Co. v. Guaranty Trust Co.*, 172 App. Div. 16, 157 N.Y. Supp. 955 (1916); *Legniti v. Mechanics and Metals Nat. Bank*, 230 N.Y. 415, 130 N.E. 597 (1921); Swiss Federal Tribunal, April 6, 1925, *Amliche Sammlung* 51 II 199. (The *Legniti* case suggests that, on a different set of facts, indicated by the court, the agency theory would be appropriate; those facts, however, do not seem to be distinguishable.) In favor of the agency doctrine: *Bank of British North America v. Cooper*, 137 U.S.

vided it be employed with qualifications which would make manifest certain "sale" features of the transaction.³² First of all, the national money paid by the client to his bank should not be considered, through a rigid application of agency law, as a quasi-trust fund, giving the client, upon the bankruptcy of the bank, a privilege over its general creditors; the deposit of money, and the execution of the client's order are separate acts from the more formal viewpoint of banking technique and law. The client may open a special deposit account; if he does not, he must be treated the same as other depositors.³³ To this extent, the result will be the same as under the "purchase" theory. In civil law, no such problem can arise; the client, in the situation supposed, will invariably rank among the general creditors, due to the absence of any trust doctrine.

But if the bank, in carrying out the client's order, has acquired a chose in action against a foreign bank, a distinct and identifiable "res" has come into existence which should be reserved, under Anglo-American law, as a quasi-trust fund for the client,³⁴ subject, however, to the bank's lien; and this lien may become particularly important where it is the client who becomes insolvent. In such a case, the bank may sell the foreign credit and appropriate the proceeds in discharge of its claim against the customer.³⁵

473 (1890); *Reichsgericht* April 11, 1923, *R.G.Z.* 107, 136; Nov. 3, 1934, 34 *Bankarchiv* 373; Appellate Court of Hamburg, March 7, 1923, *Hanseatische Gerichtszeitung* 1923, 121. See also *Equitable Trust v. Keene*, 232 N.Y. 290, 133 N.E. 894 (1922) ("contract for future action"). In *Samuels v. Drew & Co.*, 296 Fed. 882 (C.C.A. 2d, 1924), the phrase "what the customer purchases is the bankers' undertaking or obligation to effect the payment at a different point" seems not to be inconsistent with the agency conception, the expression "purchase" being used here in a non-technical sense.

³² That neither of the two theories is entirely satisfactory in itself, is well pointed out by Turner, "Deposit of Demand Paper as 'Purchases'", (1928) 37 *Yale L.J.* 874 at 900. See also Fraenkel, "Some aspects of the law relating to foreign exchange", (1920) 20 *Columbia L.R.* 832 at 834.

³³ See the *Legniti* Case, 230 N.Y. 415, 130 N.E. 597 (1921); *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 139 N.E. 766 (1923); *Beecher v. Cosmopolitan Trust Co.*, 239 Mass. 48, 131 N.E. 338 (1921); *Samuels v. Drew & Co.*, *supra*, n. 31; *Pacat Finance Corp.*, 27 F.(2d) 810 (C.C.A. 2d, 1928); Stone, *op. cit. supra*, n. 26.

³⁴ In the *Pacat* case (see n. 33) the client was denied an *in rem* right because he was unable to prove that the banker had procured the foreign money for his order.

³⁵ The *Reichsgericht*, Nov. 3, 1934, 34 *Bankarchiv* 373, negatives the bankers' right in a case where the banker, before and probably in anticipation of, the customer's insolvency, had stopped execution of the contract.

Another qualification of the typical principal-agent relation results from the fact that the bank is not under a duty to charge the client only with its own cost price plus a commission; the bank is merely supposed to debit the client with a reasonable amount, considering market conditions. This amount, once agreed upon, the client is bound to pay,³⁶ provided the transfer is carried out by the bank.³⁷ If this has not been done, the client may rescind the contract and sue for the amount paid by him;³⁸ whereas if subsequent to the transfer the foreign money comes back as not deliverable, the banker having fully performed his duty, will be held only to the market value at the time of its return in case the foreign money has depreciated.³⁹ Despite the agreement on the rate to be paid, the client can "revoke" his order but this can be done only through a "repurchase of the cable transfer", which the bank as his fiduciary must carry out under market conditions as long as payment to the foreign recipient may yet be averted.⁴⁰

While to this extent there are elements of the sale relationship, the agency features clearly reappear in the fact that the bank must strictly carry out the directions of the client in respect to the manner of payment and to other particulars of the transaction.⁴¹ It will be responsible for acts done or omitted by it or by its subagents according to the law of agency, and its deviation from the directions given will be ex-

³⁶ The time of payment, if not expressly fixed by contract, may be gathered from trade customs. Generally, the "purchaser" has to perform first. Swiss Federal Tribunal, *cit. supra*, n. 31; particulars on German usage in Nussbaum, *Das Geld* (1925) 259; H. Rosenthal, *op. cit. supra*, n. 26, at 12, 29.

³⁷ In this sense, the contract is "executory" rather than an executed sale. *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 139 N.E. 766 (1923); *Atlantic Communication Co. v. Zimmerman*, 182 App. Div. 862, 170 N.Y. Supp. 275 (1918).

³⁸ *Chemical National Bank v. Equitable Trust Co.*, 201 App. Div. 485, 194 N.Y. Supp. 177 (1922); *Safian v. Irving National Bank*, 202 App. Div. 459, 196 N.Y. Supp. 141 (1922), *aff'd* 142 N.E. 264 (1923); *Buckman v. American Express Co.*, 262 Mass. 299, 159 N.E. 629 (1928).

³⁹ *Katcher v. American Express Co.*, 94 N.J. Law 165, 109 Atl. 741 (1920); *Weiss v. Liberty Trust & Savings Bank*, 227 Ill. App. 405 at 410 (1923).

⁴⁰ Short of payment to the beneficiary, the customer can revoke his instructions while the money is in the hands of the remitting bank or its agent. *Société Coloniale Anversoise v. London & Brazilian Bank*, [1911] 2 K.B. 1024 (K.B., 1911).

⁴¹ For an example of an unusual direction to the bank, see Appellate Court of Hamburg, May 26, 1919, 19 *Bankarchiv* 9, where the customer had directed that a payment, in Lisbon, of Portuguese money be made by a Madrid bank.

cused neither by the consent of the payee⁴² nor by the fact that the bank followed a technically correct method.⁴³ The liability of the bank, however, is ordinarily limited by special provisions incorporated into the contract.⁴⁴

In the Central European countries, banking accounts in foreign exchange, such as dollar accounts, were widely used until they were more or less suppressed, at least in Germany and Austria, by the recent exchange control legislation.⁴⁵ This account device which assimilates foreign money transactions to regular bank deposits, brings into relief the creditor-debtor relationship or what would be tantamount to it: the "purchase" feature of the relationship between the bank and the customer. Generally, there is a tendency in German law and its derivatives to place a stock broker in the advantageous position of a vendor or purchaser;⁴⁶ and this was extended to foreign exchange brokers since foreign exchange was traded on the stock exchanges.⁴⁷ Still, delivery of foreign exchange, under a foreign exchange account, will ordinarily be made abroad, and may possibly be in the form of a cable transfer, necessarily involving an agent's services. Keeping an account in foreign money, then, amounts to availability, on demand,

⁴² *Bank of British North America v. Cooper*, 137 U.S. 473 (1890). The defendant bank, receiving money from the plaintiff, contracted to send a cable transfer to its London office, and thereafter to remit the amount through the mail by check to the payee in Glasgow. The cable transfer was sent, but pursuant to a request by the payee, the London office deposited the amount in a London bank to the account of the payee. The amount was applied to the payee's indebtedness to the London bank. The court held defendant bank liable for the loss to plaintiff, who was obliged to meet a draft which the cabled amount was supposed to meet.—However, under the circumstances, the bank's procedure was probably justifiable.

⁴³ *Landesberg v. Bankers Trust*, 121 Misc. 117, 200 N.Y. Supp. 308 (1923).

⁴⁴ Such stipulations were applied in favor of the bank, in *Aleman v. American Express Co.*, 237 Mass. 580, 130 N.E. 253 (1921); *Sommer v. Taylor*, 190 N.Y. Supp. 153 at 154 (1920); they were discarded, by restrictive interpretation in *Gravenhorst v. Zimmerman*, 236 N.Y. 22 at 32, 139 N.E. 766 at 769-70 (1923).

⁴⁵ *Infra*, sec. 37 I. In Swiss Federal Tribunal, April 6, 1925, *Amtliche Sammlung* 51 II 199, there was a guilder account with a Swiss bank.

⁴⁶ The stock exchange broker may and does declare himself a vendor-purchaser and thereby escape fiduciary duties laid upon him. (So-called *Selbsteintritt* or right to enter the contract as a vendor or a purchaser.) See Nussbaum, *Tatsachen und Begriffe im Deutschen Kommissionsrecht* (1917) 67.

⁴⁷ There are, therefore, official regulations by the Stock Exchange as to transactions in foreign exchange. Nussbaum, *Das Geld* (1925) 258. At present this has little significance due to the establishment of exchange control, *infra*, sec. 37 I.

of wireless transfers; and frequently, the account, by sale of the foreign currency or rather of the foreign currency credit, will be converted into domestic money. The sale, however, may possibly result in a book operation since the banker is under no duty to cover his obligation in the market.⁴⁸ Consequently, the banker should be held liable even though his right against his correspondent be confiscated or else affected by unforeseeable events. However, the bank again is usually protected by exculpatory clauses.⁴⁹

Instead of sending a cable, a letter, so-called "letter of delegation" may be sent by the bank to its foreign correspondent, when there is sufficient time for doing so. The rules discussed above will also apply to these letters of delegation.

IV. *Futures. Restrictions on Foreign Exchange Transactions*

An elaborate foreign exchange trade will probably include "futures" or forward transactions after the model of produce exchange (and continental stock exchange) dealings.⁵⁰ Where a currency is fluctuating in value, merchants contracting for future sales of commodities, to be paid in that currency, will feel the need to seek protection against loss threatening from an adverse movement of the rate of exchange until the time of payment. The same will be true if those merchants are operating under a fluctuating currency, even if the currency contracted for is a stable one. Protection can be obtained through a "hedging" transaction, namely, by the commodity purchaser buying "forward" the amount of foreign currency needed, and by the commodity vendor selling short in the forward market. A firm in Shanghai, *e.g.*, having bought goods with pounds from a London house, payment to be made in three months' time, may have had secured the pounds from a bank to be delivered at the same time, with

⁴⁸ Owing to the *Selbsteintritt*. However, as to dealings in foreign exchange, the situation is practically the same under American law.

⁴⁹ See H. Rosenthal, *cit. supra*, n. 26, at 48 n. 175.

⁵⁰ Whitaker, *Foreign Exchange* (2d ed., 1933) 285; S. E. Thomas, *Principles and Arithmetic of Foreign Exchange* (1934) 240; Vogel, "Das Devisen-Termin-Geschäft" (*Bank- und Finanzwirtschaftliche Abhandlungen*, ed. by Prion, No. 4) (1924).

Chinese money at the current rate for forwards.⁵¹ This example is somewhat oversimplified, but sufficient for the purpose of the present discussion. It has been judicially recognized that hedging of this type is in accord with prudent business conduct. Thus when the vendee of goods had secured the purchase price by a hedging transaction the foreign vendor who has failed to deliver the goods was held liable to compensate him for the loss incurred when the money secured could not be used for the payment of the goods.⁵² Futures, of course, lend themselves not only to hedging purposes, but also to speculation and wagering just as in the produce exchanges. There are a number of continental decisions passing on the application of gambling laws to futures in foreign exchange,⁵³ some of them invalidating the contracts on that ground.⁵⁴ The writer has been unable to find pertinent Amer-

⁵¹ For such a case, involving "exchange contracts" between a Shanghai commercial corporation and a London bank, see *Bank of China, Japan and the Straits, Limited v. American Trading Company*, [1894] A.C. 266 (Privy Council, 1894). On hedging contracts generally, see Patterson, "Hedging and Wagering on Produce Exchanges", (1931) 40 *Yale L.J.* 843, and with regard to foreign exchange, Minty, *The Law Relating to Banking and Foreign Exchange* (1936) 273; Nussbaum, "Die Börsengeschäfte" in 4 Ehrenberg's *Handbuch des Handelsrechts* (1918) II 634.

⁵² *Reichsgericht*, Sept. 29, 1924, *J.W.* 1925, 138; Oct. 13, 1925, *R.G.Z.* 111, 380, citing the author for the appropriateness of hedging. *Contra*: Austrian Supreme Court, Oct. 23, 1923, 6 *Die Rechtsprechung* 54. Still there is no duty to hedge. Appellate Court of Hamburg, Feb. 17, 1923, 43 *Die Rechtsprechung der Oberlandesgerichte* 105. When the mark incessantly dropped the *Reichsgericht*, in the 1924 decision, held the foreign mark-debtor obligated to close his hedging transaction. But what the *Reichsgericht* really did was to expect the debtor to predict later monetary developments. In fact, the court more or less abandoned this objectionable view in the 1925 case, citing the author. See also *Reichsgericht*, Dec. 16, 1924, *J.W.* 1925, 1270 with annotation.

⁵³ *Bank of China, etc. v. American Trading Co.*, [1894] A.C. 266 (Privy Council, 1894); *Reichsgericht*, Nov. 22, 1928, *Hanseatische Rechts- und Gerichtszeitschrift* 1929 B 55; Appellate Court of Berlin, Jan. 27, 1925, *J.W.* 1925, 643 (typical of foreign exchange transactions under an unsettled currency). The most thorough discussion of the problem is to be found in Italian decisions and legal writings. See Italian Court of Cassation, May 20, 1927, *Giurisprudenza Italiana* 1927 I 1216; July 25, 1927, *ibid.* 1927 I 912; Appellate Court of Bari, Aug. 5, 1927, *Foro Italiano* 1927, *Ripertorio*, sub nomine *Borsa* n. 65 and cases cited in next note. Comments may be found in Vivante, "Il Commercio fittizio dei cambi" *R.D.Comm.* 1927 I 281; Lordi, "Pagamento per causa illecita in contratto differenziale su divisa estera", *ibid.* 1927 I 101; Supino, "La questione ultrasecolare dei contratti differenziali", *Diritto Commerciale* 1927 I 212. Helpful summaries are *Z.A.I.P.* 1929, 30 and 316.

⁵⁴ *Reichsgericht*, Oct. 2, 1893, 17 *Bolze, Praxis des Reichsgerichts* 271; July 13, 1894, 19 *ibid.* 314 (involving futures in Russian roubles); Italian Court of Cassation, March 30, 1927, *R.D.Comm.* 1927 II 579 (ann. by Rotondi); Appellate Court of Torino, March 15, 1927, *ibid.* at 591; same Court, August 17, 1927, *Diritto Commerciale* 1928 II 82.

ican cases, although it is somewhat surprising that the American public should have foregone this opportunity for speculating. On principle short selling in foreign exchange futures would not appear to be invalid.⁵⁵

Apart from the gambling acts, futures⁵⁶ or speculative transactions⁵⁷ in foreign exchange are frequently invalidated or otherwise restricted by special legislation. France has recently imposed heavy taxes on speculative transactions, not aimed at "hedging".⁵⁸ In the United States during the Civil War, an Act of June 17, 1864,⁵⁹ prohibited transactions in gold or gold coin from being completed subsequent to the day of contracting, and transactions in foreign exchange from being completed later than within ten days. Futures in gold and in foreign exchange were thus enjoined. However, the Act which was primarily directed against gold speculation led to a disorganization of the gold market and was therefore repealed within three weeks.⁶⁰ Expropriation of private gold holdings was at that time inconceivable.

Prohibiting the import of bad foreign paper money is another typical restriction.⁶¹ This was done in the American

⁵⁵ See Charles H. Meyer, *The Law of Stockbrokers and Stock Exchanges* (1931) 230, citing cases. The N. Y. *Personal Property Law* sec. 33 expressly validates short selling. That short selling is not sufficient to make transactions in foreign exchange invalid, has been held also by the Appellate Court of Naples, Feb. 21, 1924, *R.D.Comm.* 1924 II 173, and by the Supreme Court of the Saar Territory, March 21, 1923, *J.W.* 1924, 199. In *Corsino v. Hanover Fruit Co.*, 253 Mass. 5, 147 N.E. 868 (1925), the court takes pains to show that there was not short selling on the part of the bank, but it cannot be inferred therefrom that under the opposite theory the court would have invalidated the contract.

⁵⁶ German Decrees of July 3, 1923, *R.G.Bl.* 1923 I 511, and of Nov. 8, 1924, *ibid.*, 1924 I 729, art. I sec. 3, replaced by law of Feb. 4, 1935, *R.G.Bl.* 1935 I 105, sec. 30. A Swiss decree of June 19, 1936, 1936 *Federal Reserve Bulletin* 707 prohibits forward purchases of foreign exchange "if such operation is not based upon a commercial transaction which warrants it" (this exception obviously bears upon hedging contracts).

⁵⁷ See Appellate Court of Douai, July 29, 1926, *J.D.Int.* 1927, 379, declaring void a contract of this type.

⁵⁸ Decree of July 8, 1937, *D.P.* 1937 IV 150.

⁵⁹ 13 Stat. 132.

⁶⁰ Act of July 2, 1864, 13 Stat. 344. The story of this enactment and of its repeal is told by Mitchell, *A History of the Greenbacks* (1903) 228.

⁶¹ See *supra*, p. 114, n. 9 (rouble notes). Section 4 of the German *Bankgesetz* of August 30, 1924, *R.G.Bl.* 1924 II 235 (prohibition to import foreign notes running exclusively or alternatively in terms of German currency) rests on a different policy.

colonial period.⁶² At present, the use of foreign paper money for circulation and in payments is subject to the 10% death tax.⁶³ In the majority of countries transactions in foreign exchange are void, unless licensed by the government. Provisions to this effect ordinarily form a part of a comprehensive system of exchange control. The legal significance of this recent product of legislative activity is manifest primarily in the matter of debts.⁶⁴

SECTION 11

VALUATION AND TAXATION OF FOREIGN MONEY

I. *The Mint Par*

Valuation of foreign money is required on many occasions, for instance, in assessing damages and taxes. Such valuation occurs mostly in connection with bank credits or other debts in foreign money. The principles applicable in these cases are the same as those bearing upon foreign money as such; except that bank credits and other debts will be subject to additional and special regulation with an eye to the solvency of the debtor and to other circumstances influencing the value of a debt.

There are several ways of determining the value of a given foreign currency in terms of domestic money. Under a gold standard, the exact way seems to be to ascertain the value of the pure gold contained in each of the standard coins and to calculate, on this basis, the equation between the two respective units. The same operation is possible if both of the currencies compared are on a silver standard. The equation thus found is appropriately called the "mint par" since the expression "par of exchange", employed in early American decisions,¹ is liable to be confused with the

⁶² Thus the *Massachusetts Public Act 1743/4*, c. 8 (3 *Acts and Resolves of the Province of Massachusetts Bay* 122) barred the importation of Rhode Island paper money.

⁶³ See statutes cited *supra*, p. 88, n. 6 and 8, and 20 Op. Att. Gen. 534 (1893), envisaging Canadian bank notes circulating in American border districts. The rule, of course, does not apply to foreign bank notes paid out in this country without being used in circulation.

⁶⁴ *Infra*, sec. 37 II.

¹ See, e.g., *Butt v. Hoge*, 2 Hilt. (N.Y.) 81 (1858); *Bush v. Baldrey*, 93 Mass. (11 Allen) 367 (1865); *Guiteman v. Davis*, 3 Daly (N.Y.) 120

term "rate of exchange". Conforming to a strictly metalistic theory, the prevailing American practice in the first half of the 19th century and even later² was to employ the mint par. Said a Massachusetts court in praise of the "par of exchange": "This is an absolute standard not liable to vary with the causes which produce fluctuations of exchange; and in the absence of any special contract, appears to be the most practical and just."³ But this praise results from a misinterpretation of facts. Coin is not bullion, and, even disregarding brassage and wear and tear, the value of the respective units, albeit between gold standard currencies, may fluctuate within the "gold points".⁴ If one of the two currencies involved is on silver, the fluctuations of the silver market in terms of gold become another variable factor which may possibly differ in the two countries. In the case of a bimetallic standard, equation on a gold basis may be contrary to the factual situation.⁵ And generally, as soon as there are disturbances in the monetary system which drive standard coins from circulation, reference to such coins, which may still be standard according to the statute books, will necessarily lead to wrong results. One must think here not only of the post-war monetary troubles, which present an unambiguous picture indeed, but also of earlier monetary events. An American case of 1881 bearing upon the Austrian silver gulden, which, although the standard coin of the Austrian monetary system, had actually disappeared from circulation, illustrates the inadequacy of the mint par theory.⁶

(1862) (where the term "*real par of exchange*" means what is generally called the "rate of exchange"). The French terminology which distinguishes between *pair* (mint par) and *parité* (rate of exchange) is still less to be recommended than the traditional American terminology.

² *Martin v. Franklin*, 4 Johns. (N.Y.) 124 (1809); *Scotfield v. Day*, 20 Johns. (N.Y.) 102 (1822); *Adams v. Corliss*, 8 Pickering (25 Mass.) 260 (1829); *Alcock v. Hopkins*, 6 Cushing (60 Mass.) 484 (1850). The two latter cases admitted very broad exceptions indeed. In *Grant v. Healy*, Fed. Cases No. 5696, 3 Sumner 523 (C.C.D. Mass. 1839), Mr. Justice Story held the *par of exchange* applicable to domestic payments, the *rate of exchange* to payments abroad. See also the thorough discussion in his *Commentaries on the Conflict of Laws*, secs. 308 *et seq.* (8th ed. by Bigelow, 1883) and particularly his analysis of *Cockrell v. Barber*, 16 Ves. Jun. 461, 33 Eng. Rep. 1059 (Ch., 1810) where Lord Eldon, for particular reasons, used the mint-par rule.

³ *Bush v. Baldrey*, 11 Allen (93 Mass.) 367 (1865).

⁴ See, e.g., S. E. Thomas, *The Principles and Arithmetic of Foreign Exchange* (6th ed., 1934) 62.

⁵ See *infra*, sec. 12 IV.

⁶ *Cramer v. Arthur*, 102 U.S. 612 (1881).

A striking peculiarity in American monetary history is the treatment afforded the mint par ("par of exchange") between the dollar and the pound sterling. By a proclamation of Queen Anne of 1704 the Spanish dollar was rated at 4 sh. 6d. or 54 pence, rendering the pound equal to $4.44 \frac{4}{9}$, roughly 4.44 dollars.⁷ This ratio was preserved in commercial custom for more than 150 years although both the Spanish dollar and its successor, the United States dollar, underwent alterations within this period and although England had proceeded from a gold-silver standard to a plain gold standard.⁸ Congress sanctioned the custom when in 1799 it prescribed the 4.44 rate for custom purposes.⁹ This so-called "technical par" was further divorced from reality through the devaluation of the dollar in 1834 and it was entirely upset by the depreciation of the greenbacks.¹⁰ The commercial rate of exchange was then calculated in percentages of the "technical par", and expressed in dollars and cents on the basis of £1 = \$4.44. A quotation of \$1.50 would therefore mean that the pound sterling was worth \$6.66, a mode of reckoning important for a proper understanding of earlier American decisions.¹¹ Still this method proved so confusing and detrimental that Congress by an Act of March 3, 1873, fixed the value of the pound sterling for custom purposes as well as for the construction of contracts at \$4.86, in accord with the mint par, and at the same time declared contracts made after January 1, 1874, on the $4.44 \frac{4}{9}$ parity "null and void".¹² The extension of the legal

⁷ *Infra*, sec. 15 III.

⁸ See Sen. Rep. No. 317, 42d Cong., 3d Sess. (1873) 3, and *Adams v. Cordis*, 25 Mass. 260 at 263 (1829).

⁹ Act of March 2, 1799, sec. 61, 1 Stat. 627 at 673. That the Act merely bears upon customs was held in *Phillips v. Insurance Co. of Philadelphia*, Fed. Cas. No. 11,102 (C.C.D. Pa., prior to 1822), and *Gutteman v. Davis*, 3 Daly (N.Y.) 120 (1862). Story, *Conflict of Laws* (8th ed., 1883) sec. 309, apparently understood the statute the other way. A general evidentiary effect was given to it by *Butt v. Hoge*, 2 Hilt. (N.Y.) 81 (1858). The statute was replaced by an Act of July 27, 1842, 5 Stat. 496, instituting, again for custom purposes, a ratio of 4.84 taking into account the devaluation of the dollar in 1834.

¹⁰ *Infra*, sec. 16 IV.

¹¹ See the cases cited *supra*, n. 1 and 2.

¹² 17 Stat. 602 at 603, sec. 2, as explained by the Report of the Senate cited *supra*, n. 8. That not merely a revenue regulation was intended by this law was held in *King v. Hamilton*, 12 Fed. 478 (C.C.D. Oregon, 1882).

ratio to contracts was bound to create new difficulties when after the World War the pound depreciated. Therefore, the 1873 law was repealed in 1921.¹³

II. Rate of Exchange

While the mint-par rule which today strikes one as anachronistic indeed, still retains a certain traditional weight,¹⁴ the use of the rate of exchange, reflecting the variable domestic market price for the foreign currency in question, has gradually become the method employed by the courts, especially in the field of contracts.¹⁵ Foreign exchange is traded in various forms, ordinarily varying somewhat in price;¹⁶ as coins or notes, short-term or demand bills of exchange, checks, and cable transfers. While at one time demand bills of exchange drawn upon the main market place of the foreign country were the normal basis for calculation and are still so considered in intra-European relations, in American and

¹³ Act of May 27, 1921, sec. 403(d), 42 Stat. 9 at 17. Still as late as in 1924 an attempt was made to obtain an unjust profit from an application of the 1873 statute. It was, however, rejected by the court through a sensible construction of the contract. *Wye Shipping Co. Ltd. v. Hunter, Benn & Co.*, 211 Ala. 326, 100 So. 475 (1924). The repeal of the law was not mentioned in the proceedings. Valuation merely for customs purposes was continued in section 40(a) to (c) of the 1921 Act, 42 Stat. 9 at 17, 31 U.S.C. 372, *infra*, p. 131, n. 28.

¹⁴ See *infra*, p. 131, n. 28.

¹⁵ *Robinson v. Hall*, 28 How. Pract. (N.Y.) 342 (1864); *Guteman v. Davis*, 3 Daly (N.Y.) 120 (1862); *Liberty National Bank of New York v. Burr*, 270 Fed. 251 (D.C.E.D. Pa., 1921); and many later cases. The purchasing power of the foreign exchange is irrelevant on this score. *Moser v. Corn*, 140 Misc. 417, 249 N.Y. Supp. 606 (1931), *aff'd* 234 App. Div. 842, 254 N.Y. Supp. 922 (1931). As to non-American courts, resort was had to the rate of exchange in *Delegal and Others v. Naylor*, 7 Bing. 460, 131 Eng. Rep. 178 (Common Pleas, 1831), where damages for lost Peruvian paper dollars ("billets") were awarded on the basis of the rate of exchange on Lima; and in *re Tillam Boehme and Tickle Pty., Ltd.*, [1932] Vict. L.R. 146 (Sup. Ct., 1931), advancing an elaborate argument. While in Argentina the dollar-peso ratio was by statute fixed on the basis of the mint par, it was held that in the conversion of dollar amounts into Argentine money the Argentine courts had to use the rate of exchange as of the place of payment, Supreme Court of Argentina, June 3, 1927, 17 *Revue de Droit Maritime Comparé* 172, and Fed. Appellate Court of Buenos-Aires, judgments of June 5 and 8, 1925, 12 *ibid.*, 41 and 42. In the continental courts the use of the rate of exchange is universally considered a matter of course.

¹⁶ As to the technique of dealing in foreign currency, see Whitaker, *On Foreign Exchange* (2d ed., 1937); S. E. Thomas, *Principles and Arithmetic of Foreign Exchange* (1934); Arnauné, *La Monnaie, le Crédit et le Change*, (6th ed., 1922) 123. The subject, of course, has undergone momentous alterations, through recent legislative developments.

trans-oceanic commerce the quotations for cable transfers will be held decisive.¹⁷ The traditional term "rate of exchange" ("*cours du change*", "*Wechselkurs*") is customarily used in this case also. Where the respective local markets at the decisive time are at variance, the place of payment should be controlling.¹⁸ Doubts may arise from the fact that local quotations do not reflect the real market situation or have been discontinued as a result of political or financial troubles. Such a situation would not warrant a reliance upon the last official and true quotation;¹⁹ instead, a fair appraisal of the market should be sought by a weighing of all available data, with an eye to the point of time decisive under the law.²⁰

Quotation of rates of exchange is sometimes complicated by perseverance of commercial habits rooted in past conditions.²¹ The American use of the "technical par" of the pound sterling, discussed above, is a striking example.

III. "Inland Money"

A special situation exists in respect to countries such as Germany, Italy and Russia which have forbidden the export and import of their national currency. The official rate of such "inland currency" is practically determined by the re-

¹⁷ Under 42 Stat. 9 at 17, sec. 403, 31 U.S.C. 372(c) (see *infra*, n. 28), the buying rate for cable transfers in the New York market must be applied, and if there is no such buying rate, the rate applicable is to be calculated "from actual transactions and quotations in demand or time bills of exchange".

¹⁸ See *Richard v. National City Bank*, 231 App. Div. 559, 248 N.Y. Supp. 113 (1931). Similarly, Supreme Court of Austria, February 1, 1933, *Die Rechtsprechung* 1933, 29. *Rudkowsky v. The Equitable Life Ass. Soc.*, 145 Misc. 765 at 777, 261 N.Y.S. 23 (1932), rev'd 266 N.Y. 451, 195 N.E. 149 (1934), looks at the place where the remedy is sought.

¹⁹ As was held in wartime by the Austrian Supreme Court, August 1, 1916, *Zentralblatt für die Juristische Praxis* 1917, 640. *Contra*: Italian Court of Cassation, March 29, 1924, *Foro Italiano* 1924 I 587 (regarding Austrian currency), and the early English case *Pollard v. Herries*, 3 Bos. & Pull. 335, 127 Eng. Rep. 183 (Common Pleas, 1803).

²⁰ *Cour de Cassation*, Aug. 3, 1936, *J.D.Int.* 1937, 302. The regulation contained in 42 Stat. 9 at 17, sec. 403, 31 U.S.C. 372(c), quoted *supra*, n. 17, might lend itself to universal application. During the Napoleonic wars, the Appellate Court of Rennes, March 2, 1813, in evaluating the pound sterling, had resort to the "intrinsic value", that is, to the mint par. *Répertoire Dalloz*, under "*monnaie*" n. 73. Recently the Commercial Court of le Havre, Nov. 16, 1937 *Recueil de Jurisprudence du Havre* 1938 I 44, employed the first quotation following the reopening of the Stock Exchanges (closed merely for a few days).

²¹ See Arnauné, *La Monnaie, le Crédit et le Change* (6th ed., 1922) 127 and *passim*.

spective government which supports and directs the regular market. Usually the official rate is considerably higher than the real value of the monetary unit, a fact graphically shown by the lower rate of marks, lire, roubles, etc., sold by the respective government for travelling or other privileged purposes.²² How then to value the foreign monetary unit if, for instance, it is to be converted by judgment into the money of the forum? The question was extensively discussed in relation to roubles in *Arcos Ltd.*²³ v. *London and Northern Trading Co., Ltd.*²⁴ The court applied the official rate of exchange holding it to be impracticable to use any other source of valuation, particularly the black-market rate and the lower inland buying power of the rouble. Although it would seem appropriate to allow a certain abatement of the doubtless overrated official quotation,²⁵ the court's method is basically sound. Its objection to reference to the purchasing power of "inland money" is particularly cogent since that is largely determined by local and individual circumstances and obscured by fiat quotations and other measures of planned economy so as to render a judicial application practically impossible.²⁶

IV. Fiat Valuation

In view of the increasing difficulties of valuation, a method is coming to the fore that may for convenience be called "fiat valuation" since by this means the value of for-

²² In a controversy which arose in 1936 between the United States and Germany over the use of "controlled marks" for the promotion of German exports, the German Government apparently took the ground that such a use was to be considered as a kind of devaluation, 38 Op. Att. Gen. 489 at 499 (1936), and *infra*, sec. 39 at n. 9.

²³ *Arcos* was an official commercial organization of the Soviets in England.

²⁴ 53 Lloyds L.R. 38 at 47 (K.B., 1935).

²⁵ See Hubbard, *Soviet Money and Finance*, (1936) 331.

²⁶ Says Hubbard, *loc. cit.*, 131: "Today it is simply fatuous to try to symbolize the value of the paper rouble in terms of any other currency." The same is true for other "inland currencies". Still courts have sometimes to do the symbolizing, and it cannot be done without a certain arbitrariness.

In "The Eisenach" 54 Lloyds L. Rep. 354 (Adm. Div., 1936) reward for the salvage of a German ship was claimed. Because of the "very fluid and uncertain state of the relative value of £ and Mark" the court partly resorted to conditions of the English ship market. On the other hand, in *Dougherty v. National City Bank*, 157 Misc. 849, at 868, 285 N.Y.S. 491 (1935) the referee decided that the *torgsin* and other inner-Russian prices as well as "bootleg transactions" should be taken into account; but the result of that investigation is not known.

foreign currency is fixed, with binding force upon the courts, by statute or, through legislative delegation, by governmental agencies. This method has long been widely used, especially for customs and taxation purposes.²⁷ Elaborate provisions of this type were early enacted, and are still in force for the assessment and collection of duties upon merchandise imported into the United States.²⁸ But fiat valuation may be inaugurated in a general way.²⁹ It is chiefly as part of the recent exchange control that recourse has been had to very strict and lasting fiat valuation,³⁰ with the object of protecting the domestic monetary system.

Fiat valuation of foreign money must not be confused with the use of foreign coin as legal tender, as the British sovereign has been used in several non-British countries.³¹ Fiat valuation relates to the ideal unit of a foreign system and so to the system as a whole, and has nothing to do with legal-tender effect; on the other hand, incorporating a foreign coin into the national monetary system has no relation to the foreign system as such. Still a legal ratio to the domestic unit does exist in both cases, and that ratio is not binding upon foreign courts.³²

²⁷ Fiat valuation may also be undertaken for belligerent objectives. See, e.g., the French law of 16 *Thermidor* Year II (Aug. 3, 1794), 7 Duvergier, *Collection des Lois* 293.

²⁸ 42 Stat. 9 at 17, sec. 403, 31 U.S.C. 372, pursuing a line of thought commenced by the law of July 31, 1789, sec. 18, 1 Stat. 29 at 41. The present law still starts out from the mint par. Quarterly proclamations of value by the Secretary of the Treasury, made on this basis will be conclusive unless the rate of exchange has deviated therefrom more than five per cent, in which case the regulation stated *supra*, n. 17, will be applicable. The conclusiveness of the rule, upon collectors of customs and upon courts, has frequently been recognized. *Hadden v. Merritt*, 115 U.S. 25 at 29 (1885); *U. S. v. Klüngerberg*, 153 U.S. 93 (1894); *U. S. v. Knauth*, 77 Fed. 599 (C.C.S.D.N.Y., 1896); *Amalgamated Textiles v. U. S.*, 84 F.(2d) 210 (Court of Customs and Patent Appeals, 1936). A strange application of the rule was made in *Incitti v. Ferrante*, 12 N.J. Misc. 840, 175 Atl. 908 (1933), regarding an ostensibly promissory note on 15,400 Italian lire. The court held the note to be a negotiable instrument since the amount of dollars equivalent to the lire is established by proclamation of the Secretary of the Treasury. Yet the equivalent, in this situation, is obviously determined by the rate of exchange. The result reached by the court is accurate for other reasons. *Infra*, sec. 32 at n. 33.

²⁹ As was done by the American statute of 1873, *supra*, p. 127, n. 12.

³⁰ Particularly strict is the German law, see *infra*, sec. 37 I. The Austrian Supreme Court, Feb. 1, 1933, *Die Rechtsprechung* 1933, 25, proceeded to a remarkable restrictive interpretation of the Austrian fiat valuation applying it only to deals in foreign exchanges, and not to debts couched in terms of foreign currency.

³¹ *Supra*, p. 115.

³² See the cases *supra*, p. 115, n. 17.

V. *Taxation*

The problem of taxation, so closely related to matters of valuation, is becoming more and more important in relation to tax items in foreign money. Tax law necessarily requires that profits and losses and other factors of taxation be expressed in the currency of the taxing state (tax currency). If the value of this currency fluctuates in terms of gold or purchasing power, profits or losses shown may be fictions from the economic angle. However, the taxing state does not and cannot go behind the picture as shown in terms of the tax currency; which is another and important aspect of the nominalistic principle. If, for instance, an American merchant bought goods before, and sold them at a higher price after the abandonment of the gold standard, the difference was taxable income no matter whether a profit existed in terms of gold or in terms of purchasing power.³³ Where foreign currency is involved in the taxation process, it has to be translated into the tax currency according to the rate of exchange,³⁴ which merely bears upon the relative value of the two currencies concerned and may again result in figures with no financial reality. In case the rate at the end of the fiscal year is at variance with the rate as of the date when the foreign-currency item originated, the question arises whether the difference can be transferred to the profit and loss account or whether a "realization", by sale or otherwise, is necessary, as in the case of securities. The first alternative seems to be

³³ See Wahle, *Das Valorisationsproblem* (1924) 11, and for a study of the futile efforts of German tax law to cope with these problems of inflation, Marcuse, "Geldentwertung und Abgabenrecht" in *Die Geldentwertung in der Praxis des Deutschen Rechtslebens* (1923) 137. After the stabilization, the emergency tax decree of Dec. 19, 1923, *R.G.Bl.* 1923 I 1205, had to compute the income on an arbitrary basis since the attempt to adjust the inventory value to the rapidly progressing monetary depreciation had failed. Cf. Law of March 20, 1923, *R.G.Bl.* 1923 I 198, Art. II, 5 and 6.

The *New York Times*, August 12, 1938, p. 27, reported a suit brought on the opposite theory by Georges A. Baton, Chicago, against the tax authority. The plaintiff had gained a nominal profit from the sale of securities.

³⁴ U. S. Bureau of Internal Revenue, Office Decision, O.D. 590, 3 C.B. 75 (1920). *France*: *Conseil d'Etat*, Dec. 28, 1933, *Gazette du Palais*, 1934 I 415, and July 22, 1935, *J.D.Int.* 1936, 873. *Germany*: *Reichsfinanzhof*, Sept. 4, 1934, 34 *Bankarchiv* 143, disallowing the setting up of a reserve for a foreseeable depreciation of the foreign currency. As to foreign currency under exchange control, see sec. 38 IV.

the answer where the taxpayer is a dealer in foreign money³⁵ or where he needs foreign money in his daily business.³⁶ The second alternative was resorted to where foreign money served as an investment.³⁷

Other problems in relation to foreign currency ordinarily appear where a foreign enterprise, be it of a resident or a nonresident, is subject to be taxed. The basic question here is whether profit or loss is to be ascertained in the currency in which the taxpayer operated, and the balance converted into the "tax currency", or whether the income itself is to be computed in the tax currency. American law requires computation in dollars.³⁸ The range of this rule is particularly broad due to the fact that American citizens even if not residing in the United States are subject to the American income tax as to their business income.³⁹

³⁵ U. S. Bureau of Internal Revenue, Office Decision O.D. 834, Cum. Bull. 61 (1921 I).

³⁶ *Viotor v. Salts Textile Mfg. Co.*, 26 F.(2d) 249 (D.C. Conn., 1928). Under German law the same rule applies to foreign money and to purchase prices in foreign money. *Reichsfinanzhof*, March 30, 1927, 21 *Sammlung der Entscheidungen und Gutachten* 62. Loss through a relative appreciation of capital liabilities in foreign currency may be deducted without realization. *Reichsfinanzhof*, May 26, 1937, 36 *Bankarchiv* 557; for further details, see Troeger, "*Steuerrecht und Devisenbewirtschaftung*" in *Devisenarchiv* 1938, 569 at 575 and *ibid.*, 607 at 609.

³⁷ *Viotor v. Salts Textile Mfg. Co.*, *supra*, n. 36.

³⁸ *Viotor v. Salts Textile Mfg. Co.*, *supra*. The same result was attained in *North American Mortgage Co. v. Commissioner of Internal Revenue*, 18 B.T.A. 418 (1929). [Dollar loans in the U. S. by Dutch Company, repayment after depreciation of the guilder. Guilder profit disregarded.]

³⁹ Revenue Act of 1936, sec. 116(a), 49 Stat. 1648 at 1689, 26 U.S.C. 116. Here, too, the income is computed on a dollar basis, even though the taxpayer may not have any business contacts with the U. S. This may lead to absurd results if the ratio of the dollar and of the currency under which the taxpayer operates changes. See *Wheatly v. Commissioner of Internal Revenue*, 8 B.T.A. 1246 (1927), which, however, required a realization of such profits or losses by conversion of the foreign money into dollars. *Query*: whether this requirement still holds under the subsequent *Viotor* case.

CHAPTER III

THE MONETARY SYSTEM

A. IN GENERAL

SECTION 12

STRUCTURE AND TYPES OF MONETARY SYSTEMS

I. *Constituents of a Monetary System*

The characteristic properties of a modern monetary system, in contradistinction to the former "tariffing" system,¹ have been indicated. The "ideal unit", the basis of the system, is ordinarily not entirely unanchored, but is by law or in fact connected in some way with a metal value. The coins or notes of the system will represent the unit itself or simple arithmetical fractions or multiples thereof. We have then, as elements of a modern monetary system, the ideal unit and its constituents, viz., a number of corporeal money types coordinated on the basis of the ideal unit. Whether the unit itself is, actually, represented by a coin, is of no consequence.² The Sovereign, equivalent of the Pound, was not issued until 1817.³ It is equally unimportant whether the unit can be represented in the standard metal. Most European gold standard units, such as the franc and the mark, were too small in value, in-

¹ And, of course, to what may be labelled the single-money situation. From the eighth to the twelfth century, only one coin, the silver *denarius* (penny), circulated in Central Europe. See 1 Sombart, *Der Moderne Kapitalismus* (1921) 413 ["*Zeitalter der Pfennige*"].

² See *Cramer v. Arthur*, 102 U.S. 612 at 616 (1881).

³ Feavearyear, *The Pound Sterling* (1931) 197. To be sure, there had been a coinage of Sovereigns at the end of the fifteenth century, Feavearyear 43. The example of the Sovereign is given in the case *Cramer v. Arthur*, *supra*.

deed, to be coinable in gold. It is essential, however, that appropriate fractions and multiples of the unit be represented by coins or notes.

While the monetary system can function only with the cooperation of society, it is itself an artificial creation of the state designed to have exclusive force within the territory. The monetary system thus acquires political significance; the basic unit becomes a national symbol in the international monetary struggle, something like a "national flag."⁴ When Belgium, on the occasion of the reconstruction of her currency in 1926, sought a name for a novel unit, she invented the name *Belga*.⁵ Similarly *Boliviano* is derived from Bolivia, *Lita* from Lithuania, *Lat* from Latvia. And a popular belief interprets the symbol \$ to mean U. S.⁶

The monetary system described is one at the stage of technical perfection, which has indeed been quite generally reached in recent times. However, irregular features have frequently appeared, particularly during the infancy of new systems. In establishing a new currency, the state must keep at least part of the pre-existent currency in circulation for an intermediate period; the state may also have to regulate in terms of the basis of the new system, the use of foreign currency which for political or other reasons is still employed in payments. Former domestic coins and foreign coins may be *tariffed* in terms of the new monetary unit and thus be incorporated into the national monetary system. We then have "exogenous elements"⁷ of the system, which may be "exogenous" in respect to time or, as has already been shown,⁸ to territory. The borderline between the modern and the tariffing system is therefore flexible.

The word "monetary system" is used also in French terminology (*système monétaire*); the corresponding Italian phrase is *ordinamento monetario*. In Germany the expression

⁴ As mentioned by Demogue, *Journal des Notaires*, 1923, 97 at 101, Demogue himself rejects this characterization.

⁵ It may be mentioned, however, that the name *franc* for a French coin was used as early as in the 14th century. 17 *La Grande Encyclopédie* 957. See *Levy v. Cleveland, C. C. and St. L. R. Co.*, 210 App. Div. 422, 206 N.Y. Supp. 261 (1921).

⁶ The belief is erroneous, however. *Infra*, p. 164, n. 12.

⁷ The term "exogenous element" suggested in Nussbaum, *Das Geld* (1925) 45, was adopted by the *Reichsgericht*, Dec. 8, 1930, *R.G.Z.* 131, 41.

⁸ *Supra*, p. 115.

"*Währung*" has more or less displaced the *Geldsystem*; it sometimes has other meanings, however.⁹

The concept of currency as defined above¹⁰ is correlative to the notion of a "monetary system". Each system will have a corresponding definite "currency". Hence, payment made in French currency means a payment made in constituents of the French monetary system. Generally speaking, the use of the expression "currency" in this volume denotes a monetary system, an important *caveat* since American legislation limits the use of the word to paper money.

II. Standards of Monetary Systems

In the classification of monetary systems, the first question to be dealt with is that of the "standard". This refers to the metal, with the value of which the basic unit, and through it the monetary system, is tied up. As is well known, the overwhelming majority of the national monetary systems were, and the great majority still are, tied up with the value of gold. However, it is not this somewhat loose and possibly changing interconnection which is meant when one speaks of the "gold standard" or of a "silver standard" such as existed in China until 1935. The term refers to a situation in which the connection between the monetary unit and the metal unit is maintained by the operation of an automatic machinery. In its classical form, *i.e.*, as it was generally found before the World War in England, the United States, Germany, France and other countries, this automatic machinery worked about as follows: there was free import and free coinage of gold (under the orthodox theory, coinage of gold had also to be gratuitous), thereby preventing the coin value from exceeding the bullion value; gold coin could freely be melted down and exported, so the bullion value was prevented from exceeding the coin value; paper money was either re-

⁹ In the German literature of the 19th century, *Währung* ordinarily refers to irrefusable standard money, hence to gold coin in the case of a gold standard. The very uncertain and fluctuating use of the word is a defect of the German literature on money. For a judicial discussion of the *Währung* concept, see *Kammergericht* (Appellate Court of Berlin) Sept. 25, 1928, *J.W.* 1929, 446.

¹⁰ *Supra*, p. 78.

fusable, or easily redeemable in gold so that the holder could be sure of a supply of gold coins at any time; and, of course, gold coin was legal tender.

This, the classical gold standard, no longer exists. It was first replaced by the "gold bullion standard" of which the English *Gold Standard Act, 1925*,¹¹ is typical. While that Act abrogated the redeemability of the individual notes of the Bank of England, it obligated the Bank to sell bars of gold of 400 ounces troy for legal tender, that is, for notes of the Bank (£1700 being approximately the equivalent of 400 ounces). This standard, proposed by David Ricardo as early as 1816,¹² put an end to the abundant circulation of gold coin, made bank notes the principal medium of exchange, and at the same time maintained the essential features of the gold standard. Hence, under the gold bullion standard, national paper money is "convertible" rather than "redeemable", and the currency is consequently turned into a paper currency, except for coins of silver and baser metals. Since the events of 1931, the gold bullion standard has also disappeared. The self-regulating gold standard or gold bullion standard no longer exists; instead, the connection of the monetary unit and the metal unit is maintained by government regulation of the rate of foreign exchange through government buying and selling of gold and of foreign exchange. This is the policy of the "managed currency",¹³ and all gold currencies today are distinguished from automatic gold currencies by such "management". The managed currencies may themselves be differentiated on the basis of the means of management employed by the government. The regulation of the exchange rate of foreign money properly falls within the province of the central note institution. The legislature may, however, empower the government to intervene in the foreign money market and, for that purpose, to use special funds appropriated by the legislature. The special fund is called a "stabilization"

¹¹ 15 & 16 Geo. V, c. 29, sec. 1. The practice under the French law of June 25, 1928, *D.P.* 1928 IV 313 at 317, tr. 1928 *Federal Reserve Bulletin* 570, was similar. The minimum amount for the purchase of gold bullion was fixed at 215,000 francs. *Handbook of Foreign Currencies* (Dept. of Commerce, 1936) 84. As to the rights of a noteholder under a gold bullion standard, see *supra*, p. 82.

¹² In his booklet, *Proposals for an Economic and Secure Currency*.

¹³ For the purposes of economic research, the term may be used in a different sense. See, e.g., Keynes, *Treatise on Money* (1930) 8.

or "equalization" fund or account. The latter is the official English term, and its more reserved connotation indicates that the aim is rather to check fluctuations of a speculative nature than to counteract natural movements of the market.¹⁴ Management by stabilization fund was expanded by the *Tripartite (Monetary) Agreement* of 1936,¹⁵ and is not incompatible with a free economy. However, currency management, whether by stabilization fund or otherwise, may be combined with other measures of monetary planning and possibly culminate in exchange control.¹⁶

Another basis of distinction is the scope of the powers vested in government which may be required by law to maintain a prescribed gold rate or may be given freedom in this regard. Between the extremes of management committed to a definite ratio (as in Austria after 1892) and unlimited discretion (as in England since 1931), there exists a middle ground taken by the United States and Switzerland,¹⁷ in which the government's discretionary powers are limited by maximum and minimum rates. The distinction is, of course, meaningless in the case of constitutionally unbounded governments of the Fascist or Communist type.

There is no need to discuss other legally irrelevant distinctions offered by writers on economics.¹⁸ A word should be said, however, about the gold-exchange standard. This standard is, properly speaking, related to the gold-bullion standard in that the holder of fiduciary domestic money, in amounts not less than fixed by statute, is entitled to exchange it, not for gold coin or gold bullion, but for drafts on gold standard countries, calling for payment in currencies of such

¹⁴ See "Exchange Stabilization Funds", in (1937) *Monetary Review* (League of Nations, Doc. 1937 II A 81) 52.

¹⁵ *Infra*, pp. 157, 188.

¹⁶ *Infra*, sec. 37 I.

¹⁷ 48 Stat. 31 at 52, sec. 43(b)(2) as amended by 48 Stat. 337 at 342, sec. 12; 31 U.S.C. 821(b)(2) [reduction to 50-60 per cent of the old dollar value by the President]; Swiss decree of September 27, 1936, tr. 1936 *Federal Reserve Bulletin* 880 [limits for the franc set between 190 and 215 milligrams of fine gold, in the discretion of the Federal Council]. The French law of October 1, 1936, D.P. 1936 IV 393 tr. 1936 *Federal Reserve Bulletin*, 878, art. 2 [reduction of the franc value to 43-49 milligrams of gold by the cabinet], has been amended by decree of June 30, 1937, D.P. 1937 IV 138, tr. 1937 *Federal Reserve Bulletin* 720, doing away with arithmetical limitations.

¹⁸ See, e.g., Kemmerer, *Money* (1935) 94. As to the "Tabular Standard", one of the standards discussed by Kemmerer, see *supra*, p. 21.

countries. Such a system is still self-regulating in a measure, and secures to some extent the statutory gold parity of the domestic unit, affording at the same time some protection to the moneyed individual against the dangers of governmental monetary power.¹⁹ The term "gold-exchange standard" should be used only of such situations, but it is loosely employed to refer to conditions in which the holders of fiduciary money lack any right to receive drafts on gold currency countries, and sometimes even more loosely in the absence of a definite legal ratio between the monetary unit and gold. But all these are cases of managed currency, in which buying and selling foreign exchange by private individuals is at the mercy of changes in governmental policy, and the indiscriminate use of the "standard" concept is improper.

Another fluctuating term is "paper currency" (*Papierwährung*). Correctly used, it signifies merely a currency consisting exclusively of paper money except for fiduciary coins of a baser metal, and perhaps, of silver. This situation also obtains in the case of a managed currency, which is, therefore, frequently spoken of as a paper currency. However, in the case of a gold bullion standard (and, naturally, of a gold-exchange standard) the currency will also be of paper.

III. Operation of the Standard Upon the Fiduciary Constituents of the System

If a monetary system, autonomous or managed, is connected with gold, that is, wherever the value of its unit is

¹⁹ The currency of the Philippine Islands as administered, up to 1910, under the Act Constituting a Gold-Standard Fund in the Insular Treasury, of October 10, 1903, 3 Public Laws, passed by the Philippine Commission (1905) 88, furnishes an example of such a system. By Section 7 of this Act the Insular Treasurer was authorized and directed to exchange on demand . . . for Philippine currency offered in sums of not less than ten thousand pesos . . . drafts on the gold-standard fund or elsewhere to the credit of the Insular Treasury (provisions follow as to the amount of charges) . . . See on this system Kemmerer, *Money* (1931) 155. Again, under the German Bank Act of August 30, 1924, *R.G.Bl.* 1924 II 235 sec. 31 (effective since May, 1930, decrees of April 15 and 17, 1930, *R.G.Bl.* 1930 II 691), the *Reichsbank* was required to redeem its notes in gold coin or in gold bullion or in drafts on foreign countries, the choice resting with the bank. This practically resulted in a gold-exchange standard and, later on, in another cessation of redemption, when in July, 1931, transactions in foreign exchange and gold were made dependent upon governmental license.

regulated on a gold basis, it will not be sufficient to keep the value of the gold coins, if any, in the desired equilibrium with gold. Provision must be made that the value of the fiduciary constituents of the system conforms with their respective arithmetical relationship to the basic unit. Generally speaking, it is the purpose of monetary legislation and policy not only to regulate the value of the basic units, but also to uphold the legally prescribed relations of value between the constituents of the system, irrespective of their "intrinsic" value. It is for this reason that the law of the United States, after having made the dollar, consisting of 25-8/10 (now 15-5/21) grains of gold 9/10ths fine, "the standard unit of value", goes on to say that "all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity".²⁰ The surprising extension of a gold value to silver, copper, nickel and paper can be achieved without difficulty if the non-standard money is kept circulating in quantities sufficient only to satisfy the demands of the community for the smaller monetary denominations. This requires that there shall be no free coinage of the metals used for minor coins. Upon this condition, non-standard coins, such as silver coins under a gold standard rule, may even be made unlimited legal tender. The fact that the creditor can be compelled to receive silver coin of any amount in discharge of the debt might be considered a flaw in the gold standard, and the term "limping gold standard" has commonly been used to describe this situation. However, the famous examples of the American silver dollar, the French 5-franc piece²¹ and the Prussian *thaler* under the mark currency²² have shown that the tie-up of the basic unit with a gold value need not be impaired by the unlimited, and even permanent, legal tender quality of silver coin. Pre-war East India offers an instance of a de facto gold standard in which the currency in circulation was practically silver.²³ The cir-

²⁰ 31 Stat. 45, sec. 1 (1900), 31 U.S.C. 314. As to the bimetallic *arrière-pensée* of the rule, see *infra*, p. 184.

²¹ Arnauné, *La Monnaie, Le Crédit et le Change* (4th ed., 1909) 211.

²² *Infra*, p. 141.

²³ This phenomenon, famous in monetary history, has frequently been discussed; it embraces the period from 1893 (cessation of free coinage of the rupee) until 1899 (sovereign made legal tender in India),

cumstance that unlimited legal tender quality of silver coin is not at all incompatible with a monetary system based on gold, may be important in the interpretation of statutes or contracts employing terms like "gold standard", "gold clauses", "gold currency", etc. On the other hand, a law making gold coin legal tender does not guarantee the existence of a gold standard. As has already been demonstrated, law is not the ultimate sovereign in this field.²⁴

The operation of the monetary system upon its non-standard constituents was very well illustrated in the "Austrian Coupon Cases." From 1860 to 1870, Austrian railroad companies had issued multiple currency bonds, calling for payment in Austrian florins or Prussian thalers, as the bond or coupon was collected in Austria or Prussia. The Austrian florin and Prussian thaler, each representative of the monetary unit of the country of its origin, were silver coins, the Austrian and Prussian monetary systems being on silver. When Germany, in the seventies, adopted the gold standard through the establishment of the mark currency, it incorporated the Prussian thaler coins into its new system in the ratio of one thaler to three marks. Thalers, of course, could no longer be coined. Shortly afterwards the silver market began to decline considerably, partly as a result of the abandonment of the silver standard by Germany. When the coupon holder sought to collect marks in Prussia at the legal ratio of three marks to one thaler, the railroad companies objected. They were willing to pay in florins, or the metallic value equivalent in marks of as many silver thalers as the coupons called for. The cases, undoubtedly the most famous in the legal monetary history of the central European countries, were passed upon by a number of German and Austrian courts,²⁵ among

at least. See, e.g., Keynes, *Indian Currency and Finance* (1913); Laughlin, *Principles of Money* (2d ed., 1919) 524; Dadachanij, *History of Indian Currency* (1927). In *U. S. v. Lucius Beebe*, 122 Fed. 762 (C.C.A. 1st, 1903), a customs case, the Court did not succeed in coping with the rupee problem.

²⁴ See *supra*, p. 50.

²⁵ The cases are collected in (1882) 27 *Zeitschrift für das gesamte Handelsrecht* 512. The German courts held for the plaintiffs, the Austrian courts for the defendant railroads. Discussion of the Austrian Coupon Cases in which still other important problems were involved (see *infra*, sec. 20 II) was extensive and resulted in several monographs of established value: E. J. Becker, *Ueber die Couponprozesse der oester-*

them the German *Reichsoberhandelsgericht*²⁶ (Supreme Commercial Court) and the *Reichsgericht*,²⁷ which succeeded the former in 1879. The opinions of the former, both generally and in respect to the Austrian coupon suits, were outstanding for their juridical excellence. One of the points involved was whether the Austrian companies were bound by the German law which transformed the Prussian silver system into the German gold system. This preliminary question having been answered in the affirmative, for reasons to be discussed later on,²⁸ the question arose whether the position taken by the railroad companies was supported by the fact that the thalers, under the transitory provisions of the German monetary law, had remained unlimited legal tender at the rate of one thaler to three marks. This was denied by the *Reichsoberhandelsgericht* in language illuminating for monetary theory. Said the Court:²⁹

"The Court of Appeal has overlooked the true significance of that fact [the discontinuance of coining silver thalers] with respect to those old silver coins which are still circulating. In truth, there has been brought about . . . the rejection of a double standard for the period of transition. . . . For, owing to the discontinuance of their issue and their gradual withdrawal, those silver coins of old which are still circulating, are not available to debtors, as their choice or need may demand. When, on the market, the ratio between gold

reichischen Eisenbahngesellschaften (1881); Gustav Hartmann, *Internationale Geldschulden* (1882). For other citations, consult 1 Hasenoechl, *Oesterreichisches Obligationenrecht* (2d ed., 1892) 262, n. 38.

²⁶ Judgments of February 19, 1878, 23 *Entscheidungen des Reichsoberhandelsgerichts* 205 and April 8, 1879, 25 *ibid.* 41.

²⁷ Judgments of Dec. 12, 1879, 27 *Zeitschrift für das gesamte Handelsrecht* 537; of March 1, 1882, *R.G.Z.* 6, 125; of February 9, 1887, *ibid.* 19, 47.

²⁸ *Infra*, sec. 20 II.

²⁹ Judgment of April 8, 1879, 25 *Entscheidungen des Reichsoberhandelsgerichts* 41. The case *U. S. v. Lucius Beebe*, *supra*, n. 23, dealing with an analogous problem, is not enlightening.

Recently in a case not involving international aspects the French *Cour de Cassation*, April 4, 1938, *Sirey* 1938 I 188 proceeded along lines similar to the German courts. The *Cour de Cassation* was concerned with debts in terms of Indo-Chinese (silver) trade piasters which in 1930 were incorporated, as "extraneous elements", into a new Indo-Chinese piaster currency. The latter was based on gold, but depreciated after the abandonment of the gold standard. The Court deemed the silver value of the trade piaster irrelevant in the determination of the debt which, although incurred before 1930, was considered to have become an ordinary and depreciated piaster debt.

and silver changes from the one established by law, debtors are no longer able to buy cheaper silver to have it coined for their own account and thus to pay merely the actual value of silver in newly coined silver money. By the provision that thalers must be accepted in payment the same as other money of the Empire at the invariable ratio of three marks, regardless of the actual relation of gold and silver, the thaler has obtained an invariable gold value. This means that the price of the thaler exceeds its actual value insofar as silver drops below the legally established relation to gold. Those, then, who have to pay silver debts in Germany contracted prior to the new German monetary laws, may still pay them in silver *thalers*, but such *thalers* have now become a fixed equivalent of German gold currency. The debtor who pays in thalers gives away gold value as legally fixed and, owing to the constant fall of silver, in excess of silver value, without being able to compensate the loss by purchasing silver and having it coined for himself. Unquestionably, therefore, the legal value of the thaler, as far as it is still legal tender in Germany, has been changed by the establishment of the gold standard and the thaler has become an order (*Anweisung*) for gold currency."³⁰

IV. Bimetallism

The situation becomes more involved legally where the basic unit is tied up both to the gold value and the silver value. Such an arrangement, involving free coinage of both gold and silver, and known as "bimetallism" or the "double standard" (*Doppelwährung*), presupposes the fixing of a definite equation between the two values. To refer to the most famous examples, the American law of 1792, creating the dollar currency, adopted the ratio 15:1,³¹ whereas the French law of 17 Germinal Year XI (March 28, 1803) decided that it should be

³⁰ A German law of 1920, prohibiting trading, at a premium, in "existing and former silver coins of the Reich" was held not to apply to the *thalers*. Appellate Court of Dresden, Dec. 20, 1922, *Leipziger Zeitschrift für Deutsches Recht*, 1923, 149. The Court, less perspicacious than the *Reichsoberhandelsgericht*, did not see that the *thalers*, through incorporation with the monetary system of the Reich, had become silver coins of the Reich.

³¹ Act of April 2, 1792, 1 Stat. 246 at 248, sec. 11.

15-1/2:1.³² As is commonly recognized, disparity between the metal market and the legal ratio is bound to bring about serious disturbances in the currency circulation.³³ The standard metal which, in the market is valued at a rate higher than the legal ratio, will be exported or hoarded in accordance with Gresham's law that "bad money drives out good money". Since the relative valuation of gold and silver may change in the market, the double standard means as a matter of economic fact, a single alternating standard which takes no account of the legislative coordination of the two metals (except accidentally for brief periods dependent upon developments in the market). Economics and law are therefore at variance on this subject.

Bimetallism as a legal system has disappeared since the seventies owing to the progressive depreciation of silver. The monetary legislation of the present Roosevelt administration strongly favors remonetization of silver, but does not amount to bimetallism.³⁴

V. *Dual Standard*

"Dual monetary system", a phrase which has been occasionally employed in recent American cases,³⁵ should be distinguished from bimetallism. It refers in the first place to a situation where paper dollars and gold dollars circulate simultaneously at varying ratios to gold, as during and after the Civil War; and in the second place to a legal differentiation of dollar creditors as they have, or lack the protection of a contractual "gold clause". Without neatly separating the two situations, the courts point out that a dual monetary system would be unsound and contrary to basic statutory principles. This "no-discrimination" tenet is supported by emphasizing such declarations of legislative policy as: "to maintain at all times the equal power of every dollar

³² Arnauné, *La Monnaie le Crédit et le Change* (4th ed., 1909) 189. See Act of 17 Germinal Year XI, 14 Duvergier, *Collection des Lois* 176.

³³ See Giffen, *The Case Against Bimetallism* (4th ed., 1896); Laughlin, *The History of Bimetallism* (1898).

³⁴ *Infra*, sec. 17 II.

³⁵ *Norman v. Baltimore and Ohio R. R. Co.*, 294 U.S. 240 (1935); *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22 at 27 and 33, 198 N.E. 617, at 619 and 621 (1935), *cert. denied* 297 U.S. 705 (1936).

coined or issued by the United States in the markets and the payments of debts". This sentence first appeared in the Act of November 1, 1893,³⁶ perhaps as a formal concession to bimetallism³⁷ and was reiterated in the preamble of the Joint Resolution of June 5, 1933, which abrogated the gold clauses.³⁸ Thence it has passed into judicial language, where however, it no longer relates to the bimetallic gold-dollar silver-dollar problem, but rather to a gold-dollar paper-dollar relationship. As a matter of fact, during and since 1933 not even the latter relationship could have been involved, since gold coin had previously been seized by the government.³⁹ The only question left was whether or not, under a gold clause contract, a dollar creditor was entitled to a greater amount of paper dollars than the named sum. For the determination of that question, neither the statutory phrase nor the term "dual monetary system" is appropriate. No dual system is involved when coin and paper money stray from their common path, but rather a derangement of a single monetary system. The transplanting of phraseology, which was intended as bimetallic, into an entirely different field is, therefore, not very fortunate.

The related term "dual standard" is applied in a more definite sense by Kemmerer to a situation where "currencies on two different standards and without any permanent ratio between them circulate side by side, one independent of the other and varying in market rates".⁴⁰ Kemmerer gives certain foreign examples,⁴¹ but there are, perhaps, several instances of what would seem to be the same phenomenon in American monetary history. Before the Revolution both "current lawful money" and "tobacco currency" circulated in certain Southern Colonies; during the Revolutionary War there were the Continental dollars and Colonial pounds,⁴² and in the Greenback period, the paper dollar and the gold dol-

³⁶ 28 Stat. 4, 31 U.S.C. 311. The 1900 provision quoted *supra*, p. 140, n. 20, is similar, however.

³⁷ *Infra*, p. 184, n. 67.

³⁸ 48 Stat. 112.

³⁹ *Supra*, p. 70, n. 41.

⁴⁰ Kemmerer, *Money* (1935) 96.

⁴¹ Mainly postwar conditions in Guatemala where local paper currency and American money were used simultaneously. Cf. also Mood, *Handbook of Foreign Currency and Exchange* (1930) 112 on Mexican postwar currency.

⁴² *Infra*, p. 173.

lar.⁴³ Helfferich, using other examples calls the same phenomenon a "parallel standard" (*Parallel-Währung*).⁴⁴ This term may be preferable in order to avoid confusing "dual" and "double" standard. Still, the concept itself tends to confuse. The underlying fact situation of which it is meant to be descriptive is one of involuntary and ordinarily transitory emergency, which is hardly a "standard" or "system" in the customary monetary meaning of the word, and certainly has very little in common with a single or double standard.

SECTION 13

MODIFICATIONS AND TRANSFORMATIONS OF A MONETARY SYSTEM

I. *Formation of a New Currency*

All monetary systems, as constituents of a working national economy, are constantly changing in many ways. Even during periods of quiet, new types of coins or of paper money may be introduced; others may be called in and invalidated; the quality of legal tender, or public receivability may be bestowed upon, or taken away from, or be limited in respect to, certain constituents of the system; regulations concerning reserves for the redemption of paper money may be changed. Despite these and other modifications, however, the continuance of the existing monetary system is not in question; the innovations do not break up the framework of the system.

On the other hand, there are many instances of major changes resulting in discontinuance of a monetary system. This happens particularly when, as the outcome of war or revolution, a new sovereign is established in the country. A victorious power, acquiring the territory of a defeated enemy, will introduce its own monetary system or at least an ancillary system. Again, the foundation of a national government will lead to the substitution of a national monetary system

⁴³ *Infra*, p. 181.

⁴⁴ Helfferich, *Money* (translated by Infield, 1927) 54. He points to the varying premium on the English guinea from 1663 up to 1695. This would scarcely be sufficient to justify the assumption of an independent standard or system. See for the guinea, *infra*, sec. 27, n. 1.

for the former local currencies. This happened in America in 1792 and in Germany when the latter, after the establishment of the German Empire in 1871, constructed a national monetary system based on gold with the *mark* as the unit, abrogating the silver systems of the several states, such as the Prussian *thaler* currency.¹ The breakdown of a monetary system may likewise give rise to the creation of an entirely new one, as in the case of the German *reichsmark*, which supplanted the *mark* in 1924.²

In case a new monetary system is created, there will normally be two sets of regulations for the transition from one system to the other. First, provision must be made for coins and paper money of the old system. They may be exchanged, at a definite ratio, for new money,³ or they may be incorporated, as "exogenous" constituents, into the new system, or else they may be abandoned. Furthermore, there are ordinarily conversion rules providing for the payment in the new currency of debts contracted in terms of the abrogated system. Thus under the German coinage law of 1873, a *thaler* debt was to be discharged according to the ratio of one *thaler* to three *marks*.⁴ Where the superseded unit has undergone a process of gradual depreciation, the conversion rule will possibly scale the conversion ratio according to the time of contracting. Such scaling acts were repeatedly passed in America and elsewhere during earlier periods of monetary history.⁵

At this point, a problem of general significance requires consideration. In his *State Theory of Money*⁶ Knapp advances the theory that any new monetary unit cannot be defined except "historically", that is, in terms of the preceding unit. As Knapp puts it, there is necessarily a linking back [*rekurrenter Anschluss*] of the new unit with the old,⁷ the

¹ *Supra*, p. 141.

² *Infra*, sec. 25, n. 7.

³ For the exchange rule adopted on the introduction of the French monetary system into Morocco, see *Cour de Cassation*, April 23, 1923, *J.D.Int.* 1924, 441. An instance may also be found in the Austrian legislation of 1811 restoring the Austrian currency. See Hargreaves, *Restoring Currency Standards* (1926) 77 (at bottom sub 2). For further examples, see Nussbaum, *Das Geld* (1925) 49, n. 1.

⁴ *Supra*, p. 141.

⁵ *Infra*, sec. 24 I.

⁶ Translation by Lucas and Bonar, 15 (the translation is not precise. Compare the German edition, 12.)

⁷ The *Reichsgericht*, April 16, 1932, *R.G.Z.* 136, 87, adopts the term "*rekurrenter Anschluss*".

connecting link appearing in the ratio chosen for the conversion of debts. This cannot be accurate since that ratio may be scaled as we have seen. For the most part, his doctrine cannot be accepted because he considers governmental action entirely decisive. Still, his theory is not without merit. A new unit means a new measure, and a new measure, say a linear measure, cannot be introduced except by means of a reference to the already known measure. In the beginning, at least, the new measure can be conceived and employed only by comparing it with the former unit. Should, for instance, the metric system be introduced in a country which uses the yard measure, people would first calculate the meters in terms of yards. All this is also true of a new monetary unit. The latter, to be sure, is not invariable like a definite linear unit, and as soon as the new unit has taken root in the consciousness of the community, it may develop independently from its starting point. The mental process that attends its initiation, however, must necessarily employ the terms proper to the former unit. Even if the old unit was based on silver, the new unit being based on gold, the *homo oeconomicus* would conceive the gold standard unit first in terms of the silver standard unit.^a

II. Charting the Boundary Line

In a case decided by the *Reichsgericht* in 1933,⁹ the *Reichsbank* on May 21, 1931, had bought from the plaintiff a bill of exchange drawn on Mexico City to the amount of

^a See also Keynes, *A Treatise on Money* (1930) 5: "It will be noticed that the money-of-account must be *continuous*. When the name is changed—which may or may not be coincident with a change in the money which answers to it—the new unit must bear a definite relation to the old. The State will, as a rule, promulgate a formula which defines the new money-of-account in terms of the old. If, however, failing a decree by the State, all contracts prior to a certain date are worked out in the old currency, and all contracts subsequent to that date are made in the new, even so the market cannot help establishing itself a parity between the two. Thus there can be no real breach in the continuity of descent in the pedigree of the money-of-account except by a catastrophe in which all existing contracts are simultaneously wiped out." It is perhaps in this sense that the *Reichsgericht*, March 17, 1932, *E.G.Z.* 136, 127, expresses the idea that the former mark currency (*Markwährung*) though replaced in 1924 by the "*reichsmark*" currency has not "perished".

⁹ Judgment of October 13, 1933, *E.G.Z.*, 142, 23. The distinction between changes within and of a monetary system is also used in *Parker v. Hoppe*, 258 N.Y. 365 at 370, 170 N.E. 770 at 772 (1932).

100,000 Mexican gold pesos maturing August 15, 1931. The contract contained the following proviso: "In case bills of exchange . . . are not paid in the currency in which they are couched the *Reichsbank* may charge the customer additionally with the rate of exchange differences if any." On July 27, 1931, a Mexican law was enacted demonetizing Mexican gold coins and providing that all debts contracted for in terms of Mexican pesos, no matter of what kind, should be discharged by payment of silver and other non-gold coins.¹⁰ The drawee of the bill of exchange took advantage of the new law, and the *Reichsbank* suffered a loss of about \$30,000 (in terms of the present dollar value). The bank having debited its customer with this amount, the latter brought suit against the bank for the amount debited. The *Reichsgericht* held for the plaintiff. It interpreted the proviso mentioned as bearing upon a situation where, owing to the establishment of a new monetary system, payment was made in a currency other than the stipulated one.¹¹ So here the question appeared whether a "new currency" had been created in Mexico. A problem which seemed merely theoretical revealed its legal significance. The Court considered the decisive criterion to be whether or not the monetary system was "entirely destroyed", and this had not happened in 1931 to the Mexican currency despite its depreciation. Judgment, therefore, went to the defendant. The fact that under the 1931 law, the unit of the Mexican system preserved its former name (*peso*), the court pointed out in a dictum, would not have excluded the possibility that a new monetary system had come into existence.

Yet the line drawn by the Court can hardly be deemed satisfactory. One may admit from a theoretical point of view, that a change of the system can occur without a change of the unit's name. But the distinction between "depreciation" and "ruination" of a currency, which had originally been advanced

¹⁰ *Diario Oficial de Mexico*, July 27, 1931, n. 23. By a simultaneous amendment of the Banking law, *ibid.*, the Bank of Mexico was relieved from the obligation to redeem its notes in gold, but the notes were not made legal tender. Actually, so small an amount of the notes was outstanding that in spite of the law, redemption in gold was made by the bank. *New York Times* April 4, 1938, Financial Section, p. 1.

¹¹ This interpretation seems assailable. The proviso presumably referred exclusively to bills of exchange running in terms of a currency other than the currency of the place of payment. In such a case under the majority of the bill-of-exchange laws, payment may be made in the local currency. See *infra*, sec. 33 I. The *Reichsgericht* admitted this interpretation as an alternative.

by the *Reichsgericht*, and by that Court only in order to limit revaluation of foreign currencies, is arbitrary and unworkable.¹² Discontinuance of the monetary system and establishment of a new one probably presupposes a change of the standard metal, or of the legal ratio of the unit to the standard metal (both in fact invariably accompanied by a change in the unit's name),¹³ plus supplanting the currency by new circulating media which run in terms of the novel unit; notwithstanding the fact that by transitional regulations one or the other constituent of the former system may provisionally be kept in circulation.

This definition, contrary to the *Reichsgericht's* one, would also cover situations where the old currency had not disintegrated, for instance, the shift from a gold standard to a silver standard. This occurred in Germany in 1875, and in Austria in 1892, when the latter passed from the guilder—which, despite its name, was a silver standard unit—to the

¹² See discussion *infra*, sec. 24 III. Abandonment of the gold standard, of course, does not destroy the identity of the monetary unit. Appellate Court of Brussels, July 8, 1936, *La Belgique Judiciaire* 1937, 172, regarding the German mark. In *Dougherty v. Equitable Life Assurance Society*, 266 N.Y. 71, 193 N.E. 897 (1934), it is mentioned that the Soviet government, in issuing new rouble series, repeatedly invalidated former issues, although provision was made for exchange of the old for the new notes at a definite ratio. *E.g.*, in 1922, the issue of former rouble notes was discontinued, these notes being exchangeable within a certain period, at the rate of 10,000:1. The Court considered this to be the "adoption of an entirely new standard" (at 93). Still there had been earlier and was later [save for the *Chervonetz* and the "rouble in gold" (at 94)] only one unit, the rouble, the natural depreciation of which was more or less reflected by the legal exchange ratio. The several denominations (*Duma-rouble*, *Kerenski-rouble*, 1922 *pattern*, etc.) simply referred to the various sets of rouble notes. Since the unit finally collapsed entirely there was no claim left for the rouble creditor. Practically the New York Court reached the same result by applying the legal exchange ratio to the consecutive rouble issues and holding that the debtor owed the last one. See also *Parker v. Hoppe*, 258 N.Y. 365, 370, 179 N.E. 770 (1932) where the evidence introduced in court had been less complete and *Dougherty v. National City Bk.*, 157 Misc. 849, at 868, 285 N.Y. Supp. 401 (1935), where it is stated that the *chervonetz* was a new and different unit. It was that, alongside of the old rouble, from 1922 to 1924, entailing a parallel ("bipaper") standard. In 1924 *chervonetz* became simply a name for ten "gold" roubles, the gold rouble being the new unit. See Arnold, *Banks, Credit and Money in Soviet Russia* (1937) 175 and Hubbard, *Soviet Money and Finance* (1936).

¹³ To be sure, the name in itself would not be decisive, *R.G.Z.* 142, 23 at 29; *Dougherty v. Equitable Life Assurance Society*, 266 N.Y. 71, 193 N.E. 897 (1934).

crown (*krone*), a gold standard unit.¹⁴ The creation of the German *reichsmark* and of the Austrian *schilling* in 1924 would also be good examples, since in both cases there was a renovation of the basic unit as well as of the currency.¹⁵ The same is also true, of course, where a new Sovereign establishes his monetary system in a newly acquired territory.¹⁶ There was, however, no new currency in the Mexican case since the *peso* remained on gold and on the previous ratio; there were only abrogations of the gold clauses and demonetization of gold coins. The *Reichsgericht's* disposition of the case, therefore, was right.

III. Rise of a New Currency by Disintegration of a Monetary System

A peculiar way in which a new monetary system may arise is presented by the disintegration of a national territory or, to put it more exactly, of the monetary homogeneity of a territory. Thus, after the breakdown of the Austrian Empire in 1918, the successor states at once proceeded to stamp the crown notes circulating within their territories, closing their frontiers at the same time against the influx of foreign crown notes. Hence, new national currency units (Austrian, Hungarian and Czechoslovakian crowns) and corresponding systems came into existence.¹⁷ From a legal point of view, the monetary development in the English colonies is comparable. The early settlers carried with them the English *£.s.d.* unit, but in the American colonies¹⁸ and elsewhere, issuance of paper money and other local developments led to a disjunction of the value of the local from that of the English pound.

¹⁴ The Austrian development is discussed at some length by Knapp, *Staatliche Theorie des Geldes* (4th ed., 1923) 398 [not contained in the English edition]; see also Laughlin, *Principles of Money* (2d ed., 1917) 531.

¹⁵ See, e.g., Tate's *Modern Cambist* (1928) 71, 161.

¹⁶ The existence and validity of the new currency is entirely independent of whether or not the new sovereign is to be considered as the "successor" of the former sovereign. The two questions have been confused by the *Kammergericht* [Appellate Court of Berlin], Dec. 20, 1922, *J.W.* 1923, 189, *aff'd* by the *Reichsgericht*, Sept. 19, 1923, *R.G.Z.* 107, 121.

¹⁷ The pertinent ordinances of the various countries are collected by Fr. Steiner, "*Die Währungsgesetzgebung der Successionsstaaten Österreich-Ungarns*" (1921), particularly at 132, 198, 596.

¹⁸ *Infra*, sec. 15 I.

Obviously, as soon as the units were differently valued in business intercourse, *i.e.*, as soon as a fluctuating rate of exchange evolved between the parent and the descendant unit, diversity of units and systems had to be recognized in law also.¹⁹ The question was passed on by the House of Lords in *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.*²⁰ The point in issue was whether dividends of the Adelaide Company stipulated in terms of "pounds" referred to English or to Australian pounds, the latter having depreciated and being tendered by the Company. The court, unanimous in favor of the Australian Company, split on the applicable theory. While Lord Atkin and Lord Wright regarded the English and Australian pound as separate units, Lord Warrington of Clyffe, Lord Tomlin and Lord Russel of Killowen proceeded upon the theory that the units were still the same, but that payment effecting a discharge could be made in Australian currency, the place of performance being Australia. Underlying this reasoning was the conflict-of-laws doctrine that the manner of performance and especially the medium of payment in which a promise to pay is to be performed is governed by the law of the place of performance (payment). That law, however, does not control the substance of the debt to be paid, and the amount owed is clearly of the substance of the debt.²¹ This is true whether the plaintiff is entitled to £100 or £1,000, or to 1000 Swiss francs or 1000 French francs, or to 1000 English pounds or 1000 Australian pounds. The majority of the court did not see this point, which was thus implicitly decided on the basis that there had never been, either in the United Kingdom or in Australia, any "act in the law having the force of statute expressly separating the money of account of the United Kingdom from the money of account of Australia or creating a distinct Australian unit".²² However, as has been seen, the currency power of the government may be defeated by society and that this had happened in the case before us

¹⁹ Minor currency deviations not affecting the value of the common unit cannot justify the disintegration theory. *Adelaide Electric Supply* case, see next footnote (with regard to the relation of English and Australian currency as long as both countries were actually on gold). See also *Reichsgericht*, Dec. 8, 1930, *R.G.Z.* 131, 41, citing Nussbaum, *Das Geld* (1925) 46, with regard to the mark currency in Germany and her South West African Colony.

²⁰ [1934] A.C. 122 (H. of L., 1933).

²¹ *Infra*, sec. 30 I, sec. 34 I.

²² See the opinion of Lord Tomlin, [1934] A.C. 143.

is shown by the dual valuation appearing in the rate of exchange.²³ The Lords applied a State theory of money, unsound in itself and contrary to English tradition.²⁴

SECTION 14

IMPACT OF INTERNATIONAL LAW ON CURRENCIES

I. *International Treaties*¹

Continental countries have concluded numerous treaties on currency matters since medieval times. Many small territories, though legally independent in currency matters, were unable to obtain and preserve the necessary monetary circulation, except by forming or joining larger monetary associations, which were, however, up to the eighteenth century, also of comparatively small territorial scope.² In the nine-

²³ The Swiss Federal Court, June 27, 1918, *Amliche Sammlung* 44 II 213, refers to the rate of exchange between the French and the Swiss franc in order to demonstrate the diversity existing in fact between the two monetary systems. See *infra*, p. 155.

²⁴ *Supra*, pp. 27, 46. The independence of the Australian currency was, moreover, distinctly recognized in *Broken Hill Proprietary Co. v. Latham*, [1933] Ch. 393 (C.A., 1932), and on the Australian side, *In re Tillam Boehme & Tickle Pty. Ltd.*, [1932] Vict. L.R. 146, and in the carefully documented taxation case *Payne v. Federal Commissioner of Taxation*, 51 C.L.R. 197 (High Court of Australia, 1934), *aff'd* [1936] A.C. 497 (Privy Council, 1936) [premium of English over Australian pound taxable in Australia]. In *Colonial Ammunition Co., Ltd. v. The King*, [1937] N.Z.L.R. 946 (Sup. Ct. of N. Z., 1937), the defendant, a New Zealand corporation, sold ammunition to the New Zealand government, at a price "equal" to the current prices paid by the War Office in England. Held that the price was New Zealand pounds "equal" to the number of English pounds paid by the War Office (the latter were at a premium of 25%). The puzzling decision was reversed by the Court of Appeal, Wellington, [1938] N.Z.L.R. 354, which has held that the premium was to be taken into account in the determination of the price.

In Australian usage, the difference between the sterling and the Australian pound is frequently called "exchange". See, e.g., *Thompson v. Wyllie*, 12 *Australian Law Journal* 120 (N.S.W., 1938).

¹ See Lippert, *Handbuch des Internationalen Finanzrechts*, (2d ed., 1928) 756; 3 Neumeyer, *Internationales Verwaltungsrecht*, part 2, III (1930) 227; Baron Boris Nolde, "La monnaie en droit international public", *Académie de Droit International*, (1929) 27 *Recueil des Cours* 247. *International Monetary Conference* (1879) 777 gives a list of monetary treaties.

² Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte* (2d ed., 1926) 288; von Inama-Sternegg, *Deutsche Wirtschaftsgeschichte des Mittelalters* III 2 (1901) 372, 416; G. Salvioni, *Il Diritto Monetario Italiano della Caduta dell'Empero Romano ai Nostri Giorni* (1889) 111 (5).

teenth century, as the great national monetary systems formed and developed, currency treaties were concluded on a broader basis.³ Thus the German *Münzverein*⁴ was created by the major German countries in 1838 and expanded in 1857, when Austria joined it. In 1867, however, Austria left the union, which soon lost its entire significance with the establishment of a national German currency. Also on a national basis was the Scandinavian Monetary Union,⁵ formed in 1873 and 1875 by Sweden, Denmark, and Norway. It succumbed to the post-war crisis, particularly because of the collapse of the English pound which was financially interrelated with the Scandinavian monetary units. A world-wide objective, however, was envisaged and to a certain extent accomplished by the Latin Monetary Union⁶ which was formed in 1865 by France, Italy, Belgium, and Switzerland and which was in 1868 joined by Greece. The Union Treaty provided for the accession of other States willing to assume the obligations arising under the Treaty. In fact no such accession took place, but Serbia, Roumania, Colombia and other countries by unilateral action adopted the types of coins established by the Union. In 1927 the Union expired under the weight of the post-war crisis.

These treaties rendered uniform the weight and fineness of gold and silver coin on the basis of a common denominator and of an agreed ratio between gold and silver. In the case of the Latin Union, the common denominator was the franc; the ratio (15½:1) was likewise borrowed from French legislation. Furthermore, measures were taken to have the Union coins circulate within the territory of the Union, and the contracting governments undertook to receive Union coins in payment at their face value, and receive gold coins and five-franc silver coins without any limitation. However, the Treaties left issuance of paper money to the several states, except for an inefficient restriction in the case of German *Münzverein*.⁷ Moreover, each country retained its mints, and

³ See Albert Janssen, *Les Conventions Monétaires* (1911), giving, p. 473 *et seq.*, the full text of the Treaties in French.

⁴ Janssen, *op. cit.*, 3, 473; Baron Nolde, *op. cit.*, 266.

⁵ Janssen, *op. cit.*, 105, 506; Baron Nolde, *op. cit.*, at 384.

⁶ See 2 Palgrave, *Dictionary of Political Economy* (1923) 570; Janssen, *op. cit.*, at 149, 514; Neumeyer, *op. cit.*, 231; Baron Nolde, *op. cit.*, 372. An English translation of the text of the Union is found in *International Monetary Conference* (1879) 787.

⁷ Under the German-Austrian accession treaty of 1857, Art. 22, the Signatory Powers obligated themselves not to issue irredeemable

broad reservations were made in respect to minor coins and to coins which were in circulation when the Treaty was made. Nor, in the case of the Latin Union, was the legal tender quality of the Union coins secured throughout the Union, which was therefore confronted with the rare phenomenon of refusable though current gold and silver coin.⁸ The result was that in practice only the new coinage was unified. On the whole, the monetary systems of the several states remained separate, and to that extent the national monetary units, despite their common name, were different entities. This question became of great importance when, after the downfall of the Latin Union, "franc" creditors of international loans and other contracts of an international character claimed payment in francs of the Union, namely in gold francs, while the debtor offered payment in depreciated francs. The theory of the "international franc" of the Latin Union was rejected not only by courts of the Union countries,⁹ but also by a German court.¹⁰

Another problem, perhaps not quite so fundamental, arose during the existence of the Latin Union, due to the depreciation of silver.

The disparity between the values of the affiliated monetary units had already appeared in the seventies as a result of the depreciation of silver. The Union silver coins, although no longer "full bodied", had still to be taken at their face value by the contracting governments, and they were used, of course, primarily within the country whose currency was at a premium. Therefore at the end of the seventies there

legal tender notes, but Austria, for whom the provision was intended, was able to carry out her promise only for as long as eight months; then she returned to irredeemability.

⁸ The French Penal Code penalizes counterfeiting of money "*ayant cours légal en France*" by life sentences [Art. 132] and counterfeiting of "foreign" money less severely [Art. 133]. The *Cour de Cassation* held that union coins circulating in France but issued by foreign governments were protected by Art. 133 not by Art. 132. Judgments of March 29, 1890, *Sirey*, 1891 I 137; May 5, 1892, *D.P.* 1892 I 580. In Italy, Switzerland, and Greece the gold coins and five-franc silver coins of the Union had been made legal tender by national legislation.

⁹ French *Cour de Cassation*, Dec. 21, 1932, *J.D.Int.* 1933, 1201; Swiss Federal Tribunal, June 27, 1918, *Amtlüche Sammlung* 44 II 213; *contra*: Appellate Court of Paris, July 17, 1925, *J.D.Int.* 1925, 1018 and (semble) Appellate Court of Trieste, Feb. 21, 1935, *R.D.Comm.* 1935 II 531 at 562, *aff'd* Court of Cassation, Aug. 4, 1936, *La Settimana della Cassazione* 1937, 7. See *infra*, sec. 26 at n. 16 and 17.

¹⁰ *Kammergericht* (Appellate Court of Berlin) Sept. 25, 1928, *J.W.* 1929, 446 (elaborate discussion).

were circulating or had accumulated in France, Belgian and Italian five-franc Union pieces in the amount of about 800 million francs, receivable and received at their nominal value in terms of French francs. The question, not answered by the text of the Union Treaty, arose whether, in case of the dissolution of the Union, Belgium and Italy would be obligated to take back the pieces at their nominal value. A similar controversy sprang from the Austrian *Vereinsthaler* (Union thalers) which after the termination of the German-Austrian monetary union had remained in German circulation, constituting an increasing encumbrance upon the German monetary system. On principle, it must be said that a State does not, by issuing full-bodied money, guarantee to the holder that it will maintain its value in terms of another metal value (or of purchasing power); nor is a duty to redeem necessarily implied in a union treaty of the type described. Actually, the controversies between the interested governments were disposed of by amicable agreements.¹¹

Much had been expected from monetary unions and particularly from the Latin Union. People hoped the Union would become the initiator of a world currency. This dream has vanished like so many enthusiastic and worldwide conceptions of a more fortunate century.¹²

In the post-war period international agreements, though more desirable than ever, are becoming less and less frequent. The incessant political unrest of the world and the resulting danger of precipitous and irresistible changes in monetary relations prevent the undertaking of legal obligations in this field. The need to obtain help in the struggle for the parity of the national monetary unit has rather led to informal cooperation. It was the method of the "Gold Block",¹³ of France, Italy, Belgium, Holland, Poland, and Switzerland which collapsed in 1936 and it is still used by the "Sterling Block"¹⁴ consisting chiefly of England, the Scandinavian

¹¹ See Janssen, *op. cit.*, 95, 307; Baron Nolde, *op. cit.*, 376.

¹² See Trimborn, *Der Weltwährungsgedanke* (1931). In 1874 the United States Mint prepared a pattern for an international gold coin carrying the inscription Dollars 10, Sterling £2.1.1, Marken 41.99, Kronen 37.36, Gulden 20.73, Francs 51.81, *Catalogue of Coins, Tokens and Medals* (U. S. Mint 1914) 19, 86 and Plate VII 5.

¹³ Bradford, *Money and Banking* (4th ed., 1937) 81; League of Nations, *Monetary Review* 1937 II A 8 at 26.

¹⁴ See S. E. Thomas, *The Principles and Arithmetic of Foreign Exchange* (6th ed., 1934) 483; Foster and Rodgers, *Money and Banking* (1936) 522; *Währung und Wirtschaft* 1934, 157.

countries and certain English dominions. The members of the Sterling Block regulate their currencies by an *entente* without legal tie¹⁵ on a pound basis. There is not even an articulated official statement as to the manner of cooperation.¹⁶ Such a statement, however, exists in the case of the *Tripartite (Monetary) Agreement* of 1936 between the United States, England, and France,¹⁷ which Belgium, Holland, and Switzerland have joined.¹⁸ The statements are one-sided in form. Whether or not a treaty is back of them cannot be said since the full text of the accords has not been published. The twenty-four hours notice mentioned in the statements points to legal obligations; but even so, the legal feature would be rather insignificant because of the brevity of the notice as well as the vagueness of the terms of the agreement.¹⁹

Recently, institution of exchange control by many countries has brought about a new type of monetary treaty, the "clearing" and "payments" agreement.²⁰

We are not concerned here with the history of monetary conferences.²¹ They have, as such, no legal significance. The matter is, however, touched upon by American statutes in that they expressly open the door to "international bimetallism" authorizing the President to appoint commissioners to "international monetary conferences" and making appropriations therefor.²²

¹⁵ Apart from certain agreements between the United Kingdom and the participant dominions. See the citations in n. 14.

¹⁶ The Gold Block, however, had issued a proclamation phrased in very general terms, see Bradford, *supra*, n. 13.

¹⁷ 1936 *Federal Reserve Bulletin* 759, 940. See Warren, "The Gentlemen's Agreement" (1936) 48 *Annalist* 667; Spahr, "Tripartite Agreement" (1936) 48 *Annalist* 668; *Monetary Review*, cited *supra*, n. 13 at 30.

¹⁸ 1936 *Federal Reserve Bulletin* 940.

¹⁹ The legal significance of which in respect to the American monetary system is discussed *infra*, sec. 17 I. Of course, the co-operation among the governments involved, initiated by the agreement, is more material than its legal import.

²⁰ *Infra*, sec. 39 II. Reference may also be made to the Convention for the Suppression of Counterfeiting, *supra*, p. 34, and to the German-Polish Revaluation Treaty, *infra*, sec. 24, n. 63.

²¹ See 2 Palgrave, *Dictionary of Political Economy* (1923) 783.

²² Acts of Nov. 1, 1893, 28 Stat. 4; March 3, 1897, sec. 1, 29 Stat. 624; March 14, 1900, sec. 14, 31 Stat. 45 at 49; 31 U.S.C. 311-313. See *infra*, p. 193, at n. 44.

II. Warfare

In wartime, money may become the object of military and other warlike measures in several of its aspects. Treated as conditionally contraband in the nineteenth century, it was declared, in 1916, by the Allied Powers, to be absolutely contraband, and this doctrine, suggesting the retrogressive trend of recent international law, was adopted by Germany.²³ Another question is more important, however. It has often happened in wartime that dies of a belligerent power, having fallen into the enemy's hands, have been utilized by the latter. As pointed out by Luschin von Ebengreuth in his classic volume *Allgemeine Münzkunde und Geldgeschichte*,²⁴ there is, from the international law viewpoint, no objection to this conduct if the coining is done on the former standard. But such restraint has not always prevailed. In the Revolutionary War, American currency was counterfeited by the British and sent over the ocean as a means of destroying American credit.²⁵ Frederick the Great used captured enemy dies to manufacture coins on a lower standard.²⁶ Napoleon I seems to have had Austrian and Russian banknotes counterfeited on a large scale for purposes of war and even brought pressure upon the enemy by the threat to issue such notes.²⁷ And according to the German *Reichsbank*, the French authorities,

²³ 2 Oppenheim, *International Law* (5th ed. by Lauterpacht, 1935) 664.

²⁴ (2d ed., 1926) 148.

²⁵ See Resolution of the Continental Congress in *Journal of Congress*, Dec. 19, 1777, "Whereas large sums of Continental bills of credit have been counterfeited and issued by the agents, emissaries and abettors of Sir William Howe [the Commander in Chief of the English forces] . . ."

²⁶ Luschin von Ebengreuth, *op. cit.*, *supra*, n. 24, at 148; 2 Lippert, *Internationales Finanzrecht* (2d ed., 1928) 798.

²⁷ Lippert, *op. cit.*, at 799, giving further reference. Rhodes, *The Craft of Forgery* (1934) 161, tells the amazing story of how in 1812 Pasquier, Prefect of Paris, arrested a gang of counterfeiters in Paris whose desperate and armed resistance had to be broken by a bloody struggle with the police. It was discovered that the gang had "presses of an excellent type, and plates which proved that Austrian and Russian notes were being produced in large quantities". As soon as the Minister of Police, General Savary, learned of the events he ordered the release of the counterfeiters, who had been set to work at the command of Napoleon himself, the Russian notes having been intended for the financing of Napoleon's Russian campaign. Rhodes adds some other cases of counterfeiting for purposes of war. Unfortunately, Rhodes does not indicate the sources on which he relies.

during the Ruhr invasion in 1923, seized, in local branches of the Bank, notes not yet fully printed and cut, and issued them after having added the missing letters and figures.²⁸

Leaving aside the fact that in the latter case there was no war proper, the rules of war²⁹ have unfortunately not developed far enough to allow a condemnation of such unfair and shocking acts on legal grounds. The concept, elaborated during the World War, of what has been called economic warfare, namely, destruction by military or non-military means of the enemies' economic and financial resources, would certainly include destruction of the monetary system; and this method may become even more important in the wars of the future.

During the World War another monetary question came to the fore, when the German authorities proceeded, with the aid of local native agencies, to institute new currencies for the several occupied territories.³⁰ This happened particularly in Belgium. There the German authorities caused the *Société Générale de Belgique* to issue, on the basis of marks credited to the *Société Générale* by the *Reichsbank*, franc notes which were made legal tender by order of the occupant power. At the same time, the prewar ratio of 1 mark to 1.25 francs was made compulsory. After the armistice, the mark deposit held by the *Reichsbank* for the *Société* had considerably decreased in value through the depreciation of the mark, and so had the many mark notes spent in Belgium by German authorities and individuals. Although the Allied Powers, through their assent to President Wilson's "Fourteen Points" had renounced war-indemnity, Belgium on the ground of an alleged violation by Germany of international law, claimed damages in the amount of more than five billion francs in addition to reparation payments. This claim was accepted by Germany under heavy

²⁸ Annual Report of the *Reichsbank*, 1923, 16, quoted by Lippert, *op. cit.* 800. Schacht, President of the *Reichsbank* (later also Minister of Economics) offers considerable detail in his volume, *The Stabilization of the Mark* (1927) 62. The writer does not know of any denial of these allegations by French authorities or writers.

²⁹ See, e.g., 2 Oppenheim, *op. cit. supra*, n. 23, at 187, sec. 6; 2 Wheaton, *Elements of International Law* (ed. by Keith, 6th Engl. ed., 1929) 707.

³⁰ 3 Neumeyer, *Internationales Verwaltungsrecht*, part 2 (1930) 245; Baron Nolde, *op. cit. supra*, n. 1, at 306; Popovics, *Das Geldwesen in Kriege* (1925); Süß, *Das Geldwesen im Besetzten Frankreich* (1920); Lehnich, *Währung und Wirtschaft in Polen, Litauen, Lettland and Estland* (1923).

political pressure, in 1929, with each country expressly reserving its legal rights.³¹ The sum was to be paid in thirty-seven annuities which were soon discontinued together with the reparation payments.

In appreciating the legal implication of the situation just described, the fact must be considered that the Belgian authorities had removed from the occupied territory the cash in hand and the note printing plates of the *Banque Nationale*, the Belgian central note institute. Though this was a matter of course, a gap was created in the monetary circulation which had to be filled. Faced with the alternatives of creating a new local currency or expanding the note circulation of the *Reichsbank* to the occupied territories, the adoption of the former course by the occupant seems to have been warranted.³² German courts³³ repeatedly referred to Article 43 of the *Hague Convention of War on Land*, authorizing the occupant power "to re-establish and ensure, as far as possible, public order and safety, while respecting, *unless absolutely prevented*, the laws in force in the country", for the legal basis of the German monetary ordinances.³⁴ The German courts obviously were contemplating the phrase printed here in italics, and there are strong reasons, indeed, for admitting the existence of an exceptional situation justifying under the terms of Article 43, the infringement of domestic monetary laws. Moreover, the depreciation of the mark, due to the successful warfare of the Allied Powers, certainly did not constitute an

³¹ Treaty of July 13, 1929, (1930) 104 *League of Nations Treaty Series* 202, 206 (preamble). In the Young Committee upon reparations, the operation of the Young Plan was made dependent on the previous consummation of a Belgian-German accord. Annex VI to VIC of the Report of the Committee of Experts Constituted by the Geneva Decision of September 16th, 1928 (1929).

³² Costs of occupation may be imposed upon the population of the occupied territory by taxes and contributions, under the rule "war must support war". 2 Oppenheim, *op. cit. supra*, n. 23, at 323, 327; 2 Hyde, *International Law* (1922) 370. The creation of the new currency was aimed at supplying media of payments for the contributions levied by the German government. See Koehler in "Wirtschafts- und Sozialgeschichte des Weltkrieges" Deutsche Serie (ed. J. T. Shotwell) vol. 1: "Die Staatsverwaltung der besetzten Gebiete; Belgien" 108.

³³ Reichsgericht, April 22, 1922, J.W. 1922, 1324; Dec. 20, 1924, R.G.Z. 109, 357; Appellate Court of Braunschweig, Nov. 8, 1921, 43 *Rechtsprechung der Oberlandesgerichte* 21.

³⁴ See James Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1918) 123. The American viewpoint may be even more strongly in favor of the occupant. *U. S. v. Rice*, 4 Wheat. (17 U.S.) 246 (1819); *Fleming v. Page*, 9 How. (50 U.S.) 603 (1850); 2 Hyde, *International Law* (1922) 366.

independent ground for claims against Germany.³⁵ This does not mean that the monetary measures of the occupation authorities were entirely justifiable, since it seems doubtful that there was legitimate need for the entire amount issued. In any case, the political factors outweighed the legal. For this reason, the Belgian-German accord of 1929 can hardly be considered a precedent for the future.³⁶

³⁵ Similarly, *Greek-Bulgarian Mixed Arbitral Tribunal*, Feb. 23, 1925, 5 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 447 at 450, regarding the depreciation of the Bulgarian currency.

³⁶ The situation resulting from the occupation of Roumania by a German army was very much like the Belgian situation, since a currency was also established in the Roumanian territory by the occupying military authorities. But Roumania, not having been supported by the Allies as was Belgium, was unable to obtain the indemnification demanded. See Baron Nolde, *op. cit. supra*, p. 153, n. 1, at 89. A Belgian decree of April 8, 1917, *Bulletin Usuel des Lois*, 1917, 34, provided for the abrogation of the occupational ordinances to proceed *pari passu* with the redelivery of the occupied territory. Belgian *Cour de Cassation*, April 16, 1923, *Pasicrisie Belge* 1923 I 269. Zinc coins of 50 centimes, issued as legal tender by the German authorities and still circulating in Belgium pursuant to Belgian transitional provisions, were held to be refusable money, their legal tender quality not having been recognized by the transitional regulations. The court, however, seems to have supposed that the coins were legal tender during the occupation. To this extent the case would imply recognition of the occupational money by the courts of the power affected by the occupation. Incidentally, the case was concerned with the ejection of a street-car passenger because of his tender of allegedly poor money, a situation which has repeatedly given rise to judicial investigation into the nature of money. See *supra*, p. 67, n. 25.

B. THE AMERICAN MONETARY SYSTEM

SECTION 15

COLONIAL ANTECEDENTS ¹

I. *Basic Factors*

The monetary history of the American colonies was to a great extent determined by a permanent scarcity of coin. This fact operated to depress prices of colonial goods, to enhance the rate of interest, and generally to obstruct the economic development of the country. It is true that during the seventeenth century England's currency was also in deplorable condition and that in the eighteenth century the means of supplying the colonies with adequate coin were still limited. But beyond these difficulties the home government followed a definitely negative and prohibitive policy toward the monetary evolution of the American colonies. England was interested in curbing the prices of tobacco, sugar, rice, and other colonial exports which she needed, and in discouraging at the same time the rise of a competitive colonial industry. The dearth of coin operated in this sense and generally enhanced the dependency of the colonies. However, the colonies retaliated by developing an extraordinary ingenuity in contriving money substitutes.

Another factor determining the course of colonial monetary history and related to the scarcity of money was the colonial indebtedness to the mother country. This was due to the purchase of English manufactured goods which the colonists would not forego lest a European standard of living be abandoned, and to the general use of English shippers and agents made necessary by the *Navigation Acts*. Moreover, interest on English investments, heavy English import dues,

¹ Bullock, *The Monetary History of the United States* (1900) and Nettels, *The Money Supply of the American Colonies Before 1720* (1934) are outstanding. Professor Nettels' book, despite the narrowness of its title, presents a penetrating exposition on broad economic grounds of early colonial conditions. Valuable bibliographical data are to be found in Dewey, *Financial History of the United States* (11th ed., 1932). See also "Currency in British Colonies" and "Denominational Currency" in 1 Palgrave's *Dictionary of Political Economy* (1917) 326, 329.

quit-rents to English patrons, and other payments to England had to be satisfied.² Therefore, the colonists, as a whole, became a debtor class and soon developed an inflationary tendency which was strengthened by the underlying political antagonism. Indeed, monetary disputes proved a powerful factor in the revolutionary movement.³

II. "Commodity Money"

The earliest money substitutes invented by the colonists consisted of certain important products of colonial agriculture and industry, such as tobacco (Maryland, Virginia), rice (South Carolina), wheat, beef, pork (Northern colonies). These were made receivable in payment of taxes and other public dues at rates fixed by the respective legislatures. Frequently this so-called "country-pay" was by custom or statute, legal tender.⁴ By these qualities, "country-pay", although not real money, was distinguished from mere objects of barter. A peculiar medium of exchange which was at once barter and commodity money was the famous *wampum*, strings of small perforated shell beads. Originally used by the Indians in various forms for ornaments, it was later employed by the early settlers as a convenient means of barter with the Indians and came gradually into general use. In 1643 it was made

² See Andrews, *The Colonial Background of the American Revolution* (1924) 112, 134, 137, 138.

³ See, e.g., as to the destruction of the Massachusetts Land Bank (*infra*, n. 40), Davis, *op. cit.*, n. 40, at 153, 256. Another and spectacular instance was occasioned by the King's disallowance of a Virginia law of 1758 (c. VI, 7 Hening 240) by which public dues stipulated in tobacco currency (*infra*, p. 170), were rendered dischargeable in money at the rate of two pence per pound of tobacco, the real value of which amounted to about six pence. The law especially injured the clergy whose salaries were fixed on a tobacco basis. In a suit brought by several clergymen in 1762, after the disallowance of the law ("*Parsons' Cause*"), Patrick Henry, who later on became a prominent figure in revolutionary developments, made his first public appearance as counsel for the defendants. He violently attacked the clergy and the King, declaring that the latter, by his disallowance of a "salutary law", had "degenerated into a tyrant" and "forfeited all rights of obedience". The jury rendered a verdict of a penny damages, thus recognizing and at the same time scoffing at the King's prerogative. A motion for a new trial was unanimously overruled by the court. 3 Bancroft, *History of the United States* (last revision) 65; 3 Osgood, *The American Colonies in the 18th Century* (1924) 481; W. Wirt, *Sketches of the Life and Character of Patrick Henry* (1818) 20.

⁴ See Nettels, *op. cit.*, 210, 211.

legal tender by Massachusetts,⁵ and other colonies followed her example.⁶ Consisting of homogeneous and comparatively durable units, it reveals definite money-like features, and at the same time it makes graphic the role of the ornament element in the evolution of media of exchange.

"Country-pay" generally degenerated because the poorest quality was used in payments and wampum was counterfeited on a large scale by the use of spurious material. While wampum lost its major significance as early as the middle of the seventeenth century,⁷ country pay was partly used far into the eighteenth century.⁸ The process of deterioration of the commodity money was, of course, inflationary in nature; and so was the habit of the colonial assemblies of overrating the commodities payable on public dues.⁹

III. *Metallic Circulation*

Only a little English coin entered the colonies, remittances from England being usually made through bills of exchange,¹⁰ and such coin usually did not remain long on American soil because of the adverse trade balance with England.¹¹ Instead, foreign coins circulated. Among silver coins, Spanish and Mexican pesos, or "dollars",¹² were by far the most numer-

⁵ Weeden, "Indian Money", in (1884) 2 *Johns Hopkins University Studies in Historical and Political Science* VIII-IX; Rosendale, "Wampum Currency", in (1896) 3 *Sound Currency* 483; Bullock, *op. cit.*, 7; Laughlin, *The Principles of Money* (2d ed., 1919) 12, with illustrations.

⁶ Breckinridge, *Legal Tender* (1903) 54 at n. 1 and 2.

⁷ Except that it continued to circulate locally as small change, Weeden, *op. cit.*, at 30; Bullock, *op. cit.*, at 9.

⁸ Bullock, *op. cit.*, at 12; Nettels, *op. cit.*, at 208, n. 14, 211, n. 18.

⁹ In private payments the market price, which was to be finally determined by umpires, seems to have prevailed. Nettels, *op. cit.*, at 211.

¹⁰ See Nettels, *op. cit.*, at 165.

¹¹ After the sixties of the eighteenth century the calamity was enhanced by enactments of Parliament imposing on the colonists duties in terms of sterling, payable in hard money. Andrews, *op. cit. supra*, n. 2, at 133, 134, 137.

¹² The name dollar is of German origin. When, at the close of the Middle Ages, a demand for gross silver coin, symptomatic of economic growth, appeared in Germany, such a coin was struck in 1517 from the output of the silver mine at Joachimsthal in Bohemia. This coin, called *Joachimsthaler* or shortly *thaler*, became, in 1566, the *Reichsthaler*, an imperial coin, and was exported to England where the anglicized name "dollar" became customary for foreign silver coin of about the *thaler's* size and value. The name "Spanish dollar" was imparted to the Spanish *peso*, the fine silver contents of which were practically equivalent to the *thaler*, and which was outstanding among

ous.¹³ They were also called pieces of eight,¹⁴ because they were divided into eight *reales*. Foreign coins were obtained chiefly from the flourishing trade with the Spanish West Indies; and not unimportant was the fact that, until their activities were suppressed early in the eighteenth century, the pirates used to spend their loot in American ports.¹⁵ The various colonies proceeded to *tariff* the current foreign coins in terms of pounds, shillings, and pence at rates exceeding sterling parity, however (*e.g.*, in Massachusetts by a third), a policy which is partly explainable by the general underweight of the circulating sterling coins. The name of "current lawful money" or briefly "lawful money" or "current money", as distinguished from sterling money, became customary for the coins recognized as a medium of payment. The home government resisted and impeded the policy of overrating, but was unable to stop it. The movement to "raise" the foreign coins was intensified by the competitive desire of the several colonies to attract coin.

The resulting *imbroglio* called for interference by the home government. In 1704 by a Proclamation of Queen Anne maximum rates were prescribed for all the English dominions in America.¹⁶ The Proclamation to a certain extent yielded to the American demands; although the "just proportion" of the Spanish dollar was indicated to be 4s. 6d., a maximum rate of 6s. was allowed and certain foreign coins were permitted to

the contemporary silver coins: "The Spanish money has long been considered the first money of the world, recognized as such both by the philosopher and by the merchant", (3 Chevalier, *La Monnaie* [2d ed., 1866] 183, discussing monetary conditions of the eighteenth century.) There were some sub-species of the Spanish dollar, among them the *pillar dollar*, mentioned in Queen Anne's Proclamation (*infra*, n. 16) and still named in 11 Stat. 163 (1857), 31 U.S.C. 374 (*infra*, p. 176, n. 25); it derives its name from the two pillars portrayed on the reverse side of the coin said to represent the "Pillars of Hercules". See 1 Palgrave, *Dictionary of Political Economy* (1925) 626; Sumner, "The Spanish Dollar and the Colonial Shilling" (1898) 3 *Am. Hist. Rev.* 607. The somewhat fantastic story of the genesis of the dollar, told by Del Mar, *Money and Civilization* (1886) 105 has been replaced, in the same author's *History of Monetary Systems* (1903) 357. But the second account seems no more plausible.

¹³ Among the other coins referred to in colonial statute books the Portuguese *Johannes*, Portuguese *Moidores*, the Spanish and the French *Pistoles*, and the Arab *Chequins*, all golden coins, may be mentioned. See, *e.g.*, Laws of Maryland (1781), ch. 16.

¹⁴ A more recent example of a judicial reference to this term is *Mather v. Kinike*, 51 Pa. 425 (1866) [ground rent of 1773].

¹⁵ See Nettels, *op. cit.*, at 88.

¹⁶ See Nettels, *op. cit.*, at 242. The text of the Proclamation was embodied in the Act of 1708, *infra*, n. 19.

be overrated accordingly. For constitutional reasons the Royal Proclamation did not inflict penalties for violations, merely threatening royal disfavor to offenders.¹⁷ Although mandatory upon the Governors and other officials of the Crown, it did not change the law of the land.¹⁸ This made it all the easier for the colonies to defy the royal demands. And even when Parliament in 1708¹⁹ put prison and fine sanctions behind the Proclamation in all the American colonies, the latter, except Virginia and Maryland, again frustrated the law by disobedience or evasion; they would, for instance, rate silver by the ounce instead of rating the Spanish dollar, envisaged by the Proclamation.²⁰

Strange to say, half a century later, after the colonial paper money inflations, the "just proportion" of the Proclamation, namely \$1 = 4s. 6d. = 54 pence of sterling weight was resurrected in the commercial community as "proclamation money".²¹ This method of determining contractual payments meant in reality an accounting in a non-monetary unit, namely the value of fine silver as contained in a Spanish dollar (or the equivalent in gold coin of that value, according to Queen Anne's Proclamation). The purpose of this procedure was to escape the fluctuations of the colonial currencies. In computing sterling amounts in terms of dollars, the "just proportion" of the Spanish dollar under the Proclamation was still employed in commercial relations until the seventies of the 19th Century.²²

Although rating was uniform throughout the New England colonies, and although some other colonies also agreed upon a uniform proceeding, the policy described resulted in a tremendous disparity between the several colonial monetary laws. Professor Nettels²³ gives the following ratios of

¹⁷ See Nettels, *op. cit.*, at 245, referring to an unprinted opinion of the English Attorney General.

¹⁸ This probably explains why in 1705 Massachusetts courts disregarded the Proclamation by employing the higher Massachusetts rate of the pieces of eight. Nettels, *op. cit.*, at 243, n. 25. Professor Nettels does not give particulars concerning these cases.

¹⁹ 6 Anne, c. 30.

²⁰ See Nettels, *op. cit.*, at 246; Bullock, *op. cit.*, at 20. New York even legalized clipping of standard pieces. Nettels, *op. cit.*, at 246, n. 34.

²¹ The same term was sometimes applied to colonial money the value of which was fixed by proclamation of the respective governors. See annotation to *Cuming et al. v. Munro*, 5 Term Rep. 87, 101 Eng. Rep. 50 (K.B. 1792); Bullock, *op. cit.*, at 131.

²² *Supra*, p. 127.

²³ *Op. cit.*, at 248.

colonial money to sterling, for the period after 1708: New England 155:100; New York 155:100; Pennsylvania 178:100; Maryland 133:100; Virginia 120:100; South Carolina 161:100. There were at least as many monetary units (colonial pounds) as there were differing legal evaluations of the Spanish dollar and the other current coins. Yet even where the legal coin rates were identical, substantial differences generally existed in respect to "commodity money" and paper money, so it is more appropriate to assume as many pounds (Massachusetts pound, New Hampshire pound, New York pound, etc.) as there were colonies. In fact, each law court had to pass its judgments in terms of its domestic pounds, shillings and pence, and debts in the currency of another colony constituted foreign-currency debts, to be judicially converted into "lawful money" of the former.²⁴ Sterling was legally domestic until the Revolution,²⁵ but since execution of a sterling judgment—a point of great interest to English creditors—could ordinarily result only in a collection of colonial "lawful money", the difficulties were similar to those in the case of a judgment in foreign currency.²⁶

Basically the individual colonial pound was in the nature of a *moneta imaginaria* since it was not represented by

²⁴ See *Smith v. Jamison*, Mayor's Court of New York City, Select Cases (Morris, ed., 1935) 499 (1738), regarding New Jersey money; *Shelley v. Willet*, *ibid.*, 539 (1708), regarding Barbados money; *Strode v. Head*, 2 Wash. (Va.) 149 (1795), regarding Pennsylvania money; *Pollock v. Colglazure*, 2 Ky. 2 (1801) regarding Pennsylvania money. On the other hand, in *Broom and Platt v. Jennings and Herron*, Kirby (Conn.) 392 (1788), damages claimed on a promissory note of 1775 were assessed in terms of New York pounds. The writer cannot offer a satisfactory explanation of this case.

²⁵ See *Purviance v. Neave et al.*, 4 Harr. & McHenry (Md.) at 199, 201, 202 (1799).

²⁶ Under an Act of Virginia of 1749 (Acts of 1748, c. 12, sec. 29, 5 Henning 526 at 540) judgments were permitted to be entered in sterling money, conversion into Virginia pounds to be made by the sheriff at a fixed rate of 125:100. The actual rate of exchange on London being higher, the procedure was amended under pressure of the Home Government ("Report of the Board of Trade of Aug. 4, 1754," 4 *Acts of the Privy Council of England, Colonial Series* 143-145) as early as 1755 (Acts of 1755, c. 7, 6 Henning 478) to the effect that the conversion was to be made by the court through general order for all cases decided during the term. *Proudfit v. Murray*, 1 Call (Va.) 394 (1798); see also *Scott's Executor v. Call*, 1 Wash. (Va.) 115 (1792); *Skipwith v. Baird*, 2 Wash. (Va.) 165 (1795). Since this procedure could not take into account a depreciation of the currency between judgment and execution, it also caused displeasure to the English merchants. Cf. 4 *Acts of the Privy Council, supra*, 143 and 641. *Miller v. Home, Adm.*, Mayors Court of New York, (see *supra*, n. 24) 478 (1731-32), is an instance of a New York judgment in current money on a sterling debt.

corporeal money but was merely determined by the rating of foreign coins and of "commodity money". Massachusetts was the only colony temporarily to possess indigenous representatives of its monetary unit. In 1652 it established a mint which coined Massachusetts silver pieces of 12*d.*, 6*d.*, and 3*d.*, called "pine tree" coins because of their design; the parity of the pine tree shilling to the sterling shilling being 129:100. In 1684, however, the mint was closed by the order of the English government because its activities violated the coinage prerogative of the Crown.²⁷ A more general difference between the colonial set-up and the European *moneta imaginaria* apart from the "commodity money" feature, was the existence of paper money couched, and frequently fluctuating, in terms of the respective colonial pound.²⁸

IV. Colonial Paper Money

Issuance of colonial paper money began in 1690 when Massachusetts, under the pressure of an extreme emergency situation, issued bills of credit in order to pay the soldiers engaged in the unfortunate expedition against Canada.²⁹ The bills, probably the first paper money in western civilization, were made legal tender in 1692.³⁰ A new type of "current lawful money" was thereby created which spread rapidly over the American colonies.³¹ The bills depreciated because of over-

²⁷ See Bronson, *A Historical Account of Connecticut Currency* (1863) 13; Nettels, *op. cit.*, at 171, 174; Sumner, "Coin Shilling of Massachusetts Bay", (1898) 7 *Yale Review* 247, 405. On Connecticut and other copper coin of the preconstitutional period, see Nettels, *op. cit.*, 175, and Carothers, *Fractional Money* (1930) 42.

²⁸ A contemporary annotator of *Winslow v. Bloom*, 1 Hayw. (N.C.) 217 (1795), points out that in 1783 when the contract at bar was made the North Carolina currency was "imaginary", that its value was only ascertainable by comparison "with the coined money of other nations", and that the paper money emitted by the government in terms of North Carolina pounds had soon depreciated.

²⁹ See Bronson, *op. cit.*, at 27.

³⁰ 1 Acts and Resolves of the Province of the Massachusetts Bay, 1692-93, c. 7, sec. 1.

³¹ Nettels, *op. cit.*, at 264. See also Mr. Justice Story in *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Pet. (36 U.S.) 257 (1837) at 333. In *Deering v. Parker*, 4 Dall. (Pa.) xxiii (1760), a Privy Council case from New Hampshire, the parties in 1735 had stipulated in New Hampshire for a payment of £2460 in good public bills of the province of Massachusetts Bay, "or current lawful money of New England". In 1752, bills of credit, then current in New Hampshire, were tendered to the creditor. Lord Mansfield held that the tender was bad, the phrase "current lawful money of New England" not including bills of credit of any colony. This is, perhaps, justifiable by the alternative form of

issuance, lawful and counterfeited, because of the extension of periods of redemption and the reissuing of bills redeemed, because of the neglect to raise taxes which would have secured payment, and because of the violation of promises to reform which accompanied "new tenors".³² It is true that to colonial paper money is to be attributed much of the successful development of colonial economic potentialities. The abuses and injuries inflicted upon the general public, however, gradually assumed such importance as to cause the English Parliament, in 1751,³³ to forbid the issuance of new bills of credit except for current expenses of the colonies and extraordinary emergencies such as war and invasion. Circulating bills of credit were required to be called in immediately and to be discharged according to their terms, all acts and resolutions to the contrary being declared null and void in advance. To the extent that new issues were allowed, they were not to be legal tender.³⁴ Granting of public receivability was not prohibited and was expressly permitted in 1773,³⁵ thus settling the validity of treasury notes. The act of 1751 was confined to New England where the abuses first developed, but was extended to the rest of the colonies by parliamentary enactment of 1764.³⁶

These measures were efficiently enforced throughout the colonies. It is true that the exemptions provided by the Parliamentary Acts were utilized on a large scale so that, in 1774,

the payment proviso which contrasted bills and lawful money, but Lord Mansfield may have been influenced by the Act of 1751, *infra*, n. 33.

³² See, e.g., Bullock, *op. cit.*, 38.

³³ 24 Geo. II, c. 53. ("An Act to regulate and restrain Paper Bills of Credit in His Majesty's Colonies or Plantations of Rhode Island and Providence Plantations, Connecticut, the Massachusetts Bay, and New Hampshire in America, and to prevent the same being legal tender in payments of money.") A modern analogy to the colonial situation is presented by the Alberta Social Credit Project, *supra*, p. 31.

³⁴ The legal tender effect of the bills was, of course, the main grievance of the English merchants. They found strong support in the Privy Council which as late as 1764 felt that "the art of men cannot contrive any measure more ruinous and destructive to the unhappy country where it is allowed to take place", 4 *Acts of the Privy Council, Colonial Series* (1911) 624 at 629. However, there is no indication that the issuance of legal tender notes was regarded as an infringement of the Crown's monetary prerogatives. They were rather looked at as abusive forms of promissory notes issued by bodies similar to chartered companies. See Nettels, *op. cit.*, 276.

³⁵ 13 Geo. III, c. 57, employing the term "legal tender to the public treasurers", a phraseology no longer accurate.

³⁶ 4 Geo. III, c. 34.

between one-half and three-fifths of the circulating currency, estimated in face value at 12 million dollars or, in *silver value*, at 10 million dollars, consisted of paper money.³⁷ New issues were, however, no longer made legal tender,³⁸ and even the term "bills of credit" was avoided. This tradition was reflected in the Federal Constitution which prohibits the several states from issuing bills of credit.³⁹

Alongside the bills of credit which were government paper money, there was a growth in private paper money, although much more limited in extent. A historically notable instance is the Land Bank of Massachusetts, established in 1740, which used rather crude methods to issue circulating media on the security of land.⁴⁰ In this case also, Parliament intervened in 1741 by extending to the American Colonies the famous *Bubble Act* which required that joint stock companies should be incorporated by Crown or legislature.⁴¹ Thereupon the Land Bank and some other private banks of issue were liquidated.⁴²

The tobacco notes of Virginia and Maryland deserve special mention.⁴³ The use of tobacco as a commodity money caused serious difficulties because of the variations in quality and the tendency of debtors to pay in the poorest quality. As early as 1632 warehouses were erected in Virginia under the charge of appointed keepers whose duty it was to "overlook" tobacco before payment by a transfer of book credits with the warehouse was made. This system was greatly improved in 1713 by the building of public warehouses and the creation of transferable tobacco notes to be issued by the inspectors of the warehouses, upon delivery of first-grade tobacco. These were probably bearer notes, giving the holder the right to receive from the inspector on demand the quantity of first

³⁷ Pelatiah Webster, *Political Essays* (1791) 142.

³⁸ On a single exception (reissuance of old legal tender notes in South Carolina), see Bullock, *op. cit.*, at 45, n. 2.

³⁹ Art. I, Sec. 10.

⁴⁰ See Davis, "Currency and Banking in the Province of Massachusetts Bay", in (1901) *Publications of the Am. Econ. Assn.*, 3d series, vol. 2 # 2, p. 152.

⁴¹ 14 Geo. II, c. 37. As to the genesis of the Act, see in addition to Mr. Davis' study, 3 *Acts of the Privy Council*, *supra*, n. 26, at 683.

⁴² From a strictly legal point of view, the Land Bank would not have come within the scope of the *Bubble Act*, see Davis, *op. cit.*, at 163.

⁴³ See Brock, *A Succinct Account of Tobacco in Virginia*, 10th Census, vol. III (1883) 212, 219; Ripley, *The Financial History of Virginia* (1893) 145; Royall, "Virginian Colonial Money", (1877) 1 *Virginia Law J.* 447; Nettels, *op. cit.*, 214.

grade tobacco indicated in the note, but the holder had no lien on particular casks.⁴⁴ The notes were designed to serve as, and actually became, a circulating medium. They were even declared to be a "legal tender" in "tobacco debts"⁴⁵: i.e., they had to be accepted by the obligee where payment was stipulated in terms of tobacco. The terms "debt" and "legal tender", denoting pecuniary relationships, were used in these instances in an improper sense.⁴⁶ Although the fluctuations of the tobacco market proved a cause of grave disturbances, the tobacco currency lasted fairly well. Not being "bills of credit", the tobacco notes were not prohibited by the English Acts of 1763 and the Federal Constitution. As a matter of fact, because of their similarity to warehouse receipts, they offered a security absent in "bills of credit" and actually proved an antidote to paper money inflation. Maryland adopted the Virginia regulation in 1748 with the result that the tobacco notes became "the great currency" of Maryland.⁴⁷ Unlike Virginia,⁴⁸ Maryland seems to have clung to the tobacco currency after the creation of the American dollar.⁴⁹ In 1801, a law was re-enacted in Maryland regulating the inspection of tobacco and declaring the tobacco notes to be legal tender for tobacco debts;⁵⁰ the constitutional provision forbidding the states to make anything but gold and silver coin a tender in payment of debts⁵¹ was probably interpreted as referring to pecuniary debts.⁵² Maryland judgments articulated in to-

⁴⁴ Ripley, *op. cit.*, 149.

⁴⁵ Va. Laws of 1742, c. 1, sec. 18 (5 Henning 124 at 134). The legal tender effect was limited to the environment of the warehouse from which the note was issued, Ripley, 149. There is no such limitation in the Maryland Act of 1801, *infra*, n. 49. It is sometimes alleged that under a Virginia law of 1742 all contracts were to be made in terms of tobacco, but the writer has been unable to verify this statement.

⁴⁶ For a legal conclusion from this proposition, see *infra* at n. 52.

⁴⁷ Brock, *op. cit.*, 221, note g, 223. In North Carolina the principle underlying the tobacco notes was extended to various "rated" commodities, but without lasting success. Bullock, *op. cit.*, at 157.

⁴⁸ See Ripley, *op. cit.*, at 152. A case concerning a 1781 transaction in Virginia tobacco notes is *M'Connico v. Curzen*, 2 Call. (Va.) 358 (1800).

⁴⁹ Fees and salaries of public officers, including court clerks, attorneys and sheriffs were fixed in terms of tobacco. Therefore judgments as to cost were rendered in terms of tobacco though the principal was expressed in money. The value of a pound tobacco currency, however, was fixed by the law in Maryland currency. *Purviance v. Neave et al.*, 4 Harr. & McHenry (Md.) 199, 201, 204 (1798).

⁵⁰ Md. Laws 1801, c. 63, amended by Laws of 1804, c. 85.

⁵¹ Art. I, sec. 8.

⁵² *Supra*, n. 46.

bacco currency appear as late as 1828⁵³ although, in 1812, the Maryland legislature had ordered the courts to render judgments in terms of dollars.⁵⁴ The tobacco notes probably are the only comparatively successful paper money ever based on the produce of the soil.

The amazing diversity and anomalies of colonial currency, despite their great legal and economic interest, illustrate the imperfection of colonial monetary conditions. This state of things tended to disappear when the colonies became an independent and unified nation, although the protracted experiences of the colonial period have left their marks in the national psychology. The persistent inclination to experiment and to handle in a political and haphazard manner monetary matters which by their very nature require the use of scientific methods is certainly an unfortunate colonial heritage.

SECTION 16

OUTLINE OF THE LEGAL HISTORY OF THE DOLLAR

I. *The Continental Dollar*

When the Revolutionary War broke out it was evident that the various colonial pounds would not be an effective instrumentality for financing the War. A national unit had to be created for that purpose. A tie-up with an existent monetary value was necessary,¹ and a value appropriate for this unit could be furnished only by the Spanish dollar which was then the prevalent circulating medium and, at the same time, was used to a certain extent as a unit of account through the commercial habit of contracting in "proclamation money". Moreover, the dollar offered a national monetary flag in a war which could not very well be conducted under the emblem of the pound. All things considered, the Continental Congress deemed the Spanish dollar the best common unit obtainable, under the circumstances, and in financing the war made its bills of credit (*Continental Notes*) issued from 1775,

⁵³ In *Crain v. Yates*, 2 Harr. & G. (Md.) 332 (1828), and in *Laidler v. The State, Use of Hawkins*, 2 Harr. & G. (Md.) 277 (1828). See also *Lyles v. Lyles Ex'rs*, 6 Harr. & J. (Md.) 273 (1824).

⁵⁴ Md. Laws 1812, c. 135.

¹ *Supra*, p. 148.

payable in *Spanish milled* dollars.² *Milled* pieces (as contrasted with handmade pieces) had a corrugated edge, aimed at protecting the coin against clipping and sweating. The notes were phrased as follows:

N.	Continental Currency.	Dollars
This bill entitles the bearer to receive.....Spanish milled dollars, or the value thereof in gold or silver, according to the Resolution(s) of the Congress held at Philadelphia. [There follows the date of the Resolution or Resolutions.]		

But the day of redemption, left to the determination of Congress, was never appointed, and, as is well known, the Continental notes gradually became worthless; or, in the words frequently cited of a contemporary writer, they "gently fell asleep in the hands of their last possessors".³ Only to a very limited extent were debts incurred in terms of continental dollars revalued by state legislation.⁴ Having been issued not only in denominations of one dollar and multiples thereof, but also in fractional parts such as two-thirds, one-half, one-third and one-sixth, these notes offer the rare example of a system composed entirely of paper money;⁵ and at the same time of a veritable dual (or "*parallel*") standard inasmuch as each state simultaneously had a currency of its own with the local pound as unit, disconnected from the dollar.

II. Act of 1792

After the establishment of the Federal Government in 1789, there was practically no doubt that the dollar would definitely become the unit of the forthcoming American mone-

² See H. Phillips, *Historical Sketches of the Paper Currency* (1866); Holt, "Continental Currency" (1898) 5 *Sound Currency* 81 (depicting various types of continentals); D. Knight, *History of the Currency of the Country* (2d ed., 1900; Treasury Dept. Doc. No. 1943) 12; Bullock, *The Monetary History of the United States* (1900) 60.

³ Ramsay, *History of the American Revolution* (1815 ed.) 207. Under the Act of August 4, 1790 [1 Stat. 138] the Continental "bills of credit" were received in subscription of stock at a rate of one hundred dollar continentals for one dollar specie.

⁴ See *infra*, sec. 24 I.

⁵ In 1787, hence long after the breaking down of the continental paper money confederate copper coins of cents and half cents were issued. Carothers, *Fractional Money* (1930) 54. They were the first national coins, but they were remarkable only for this reason. Being below standard, they depreciated. Sumner, *History of American Currency* (1874) 54.

tary system. As early as 1785 Congress had passed a resolution to this effect, sponsoring at the same time, decimal division.⁶ Again, the dollar is the core of the Act of April 2, 1792, *establishing a mint, and regulating the coins of the United States*,⁷ which became the organic law of the American monetary system. Its title still reflects the gravity of the decision to incur the expense of setting up another agency of the Federal Government. The Act practically rests on Hamilton's famous report of 1791 *on the subject of a mint*.⁸ The unit of the system was based on the "value of a Spanish milled dollar as the same is now current averaged at 371-4/16 grains of pure silver",⁹ a direct acknowledgment of its Spanish parentage.¹⁰ The original legal weight of the Spanish *piece of eight* amounted to 377 grains of pure silver,¹¹ but an examination by the Treasury of a great many Spanish dollars current in the United States resulted in the adoption of the lesser weight. In a sense it may be said therefore that the American currency was founded in an act of devaluation but that would be a misinterpretation. The backward linking (*rekurrenter Anschluss*) of a new monetary unit can only be made on the basis of real (rather than statutory) valuations as existing at the time when the unit is created. The Treasury's disclosure does bring home, however, the futility of the legal-tender-by-weight conception.¹²

Bimetallism is another dominant feature of the law. It was adopted on Hamilton's advice "in order not to abridge

⁶ *International Monetary Conference* (1879) 448, from the Journal of the Continental Congress.

⁷ 1 Stat. 246.

⁸ 2 *Annals of Cong.* 2112 (1789-1791); *International Monetary Conference* (1879) 454.

⁹ Section 9 of the Act of 1792, 1 Stat. 246 at 248.

¹⁰ In addition to statutory reminders of the dollar's pedigree [see note 26, *infra*] there is the interesting development of the symbol \$, which is an evolution of Ps meaning pesos. The two vertical lines are the doubling of a single line which was a sort of shorthand simplification of P. The wavy line is the S. The popular belief that \$ abbreviates U.S. is psychologically interesting but was refuted, as were other explanations, in a brilliant essay in 2 Cajori, *A History of Mathematical Notations* (1929) 15. Another reminiscence of the Spanish system is the slang phrase *two bits* for a quarter, meaning two reales, the equivalent of a quarter. Webster's Dictionary, *sub nomine* "bit". Price quotations on a 12½ cent basis, including such sums as 6¼, 18¾, 25 cts., etc., persisted widely in this country during the first half of the 19th century. Carothers, *Fractional Money* (1930) 82, 97, 104.

¹¹ 2 *Annals of Congress* 2135 (Hamilton's Report).

¹² *Supra*, p. 51.

the quantity of the circulating medium",¹³ a suggestion quite natural after colonial experiences. Hence legal tender quality was imparted to both gold and silver coin, with the traditional full weight *caveat*.¹⁴ Likewise, free and gratuitous coinage was provided for both gold and silver coin, 1/12 per cent deduction for loss of interest being allowed in case the government or the party should desire to have the bullion exchanged at once for coin rather than to wait for the coinage.¹⁵ Since export and import of the two metals were unrestrained, the classical rules of bimetallism were satisfied. The ratio between gold and silver was determined, again on Hamilton's suggestion, as 15:1, section 11 of the Act providing: "That the proportional value of gold to silver in all coins which shall by law be current as money within the United States, shall be as fifteen to one, according to quantity in weight, of pure gold or pure silver"; and this ratio reappears in the definitions of weight given for each individual coin, 24.12/16 grains of fine gold accordingly having the same monetary value as 371.4/16 grains contained in the silver dollar. The standard of gold coin was fixed as 11 parts fine to 1 part alloy, the standard of silver somewhat lower;¹⁶ as is customary the alloy was not taken into account in determining the monetary value. The several denominations of coins were to be built up on the decimal system, contrary to English law and the Continental-dollar system. There were provided golden *eagles*, *half eagles* and *quarter eagles* with values of 10, 5, and 2½ dollars respectively; a silver *dollar or unit* and silver *half dollars*, *quarter dollars* and *dismes* and *half dismes*,¹⁷ copper *cents* and, by an Act of May 8, 1792,¹⁸ half cents were likewise provided for. *Dollar or unit* in this scale was no more than a name for a dollar coin. It would have been more accurate to call the coin "silver dollar", while reserving the word *dollar* for the ideal unit. The language of the Act has sometimes led, in political discussions and elsewhere, to the misapprehension that silver, rather than gold,

¹³ 2 Annals of Congress 2115.

¹⁴ A weight less than full should reduce the legal tender effect proportionately. Act of 1792, sec. 16.

¹⁵ Act of 1792, sec. 14.

¹⁶ Namely, 1485 parts fine to 179 alloy, an extremely awkward ratio. For an explanation, see Carothers, *Fractional Money* (1930) 62.

¹⁷ Act of 1792, sec. 9.

¹⁸ 1 Stat. 283.

was the true basis of the 1792 system, and that the silver dollar was one dollar in a more sublime sense than the eagle was ten dollars.¹⁹ That the dollar was an ideal unit (money of account) appears from Section 20 of the Act, where it is said "That the money of account of the United States shall be expressed in dollars or units, dismes or tenths, cents or hundredths, mills or thousandths, . . . and that all accounts in the public offices and all proceedings in the courts of the United States shall be kept and had in conformity to this regulation".²⁰ This is the only section of the Act which is still in force; it is prohibitive, for example, of judgments by Federal courts in foreign currency. The denomination *unit*, however, has never become popular.²¹

The Act of 1792 was supplemented by the Act of February 9, 1793,²² which, in exercise of the power of Congress to regulate the value "of foreign coin",²³ conferred definite dollar values upon the major foreign gold and silver coins which circulated in the country, making them legal tender at the ratios indicated in the law, as had previously been done by the legislation of the several colonies.²⁴ The Spanish milled dollar, full statutory weight presupposed, was, of course, equalized with the American dollar. The United States extended this privilege to the Spanish dollar (and also to its subdivisions) until the Act of February 21, 1857;²⁵ the other foreign coins had been gradually removed from circulation through prior enactments.²⁶

¹⁹ See, e.g., Bakewell, *Past and Present Facts about Money in the United States* (1936), and the writer's review of this book in (1937) 37 *Col. L. Rev.* 162. Said Hamilton 2 *Annals of Congress* at 2135: "That the unit, in the coins of the United States, ought to correspond with 24 grains and $\frac{3}{4}$ of a grain of pure gold, and with 371 grains and $\frac{1}{4}$ of a grain of pure silver, each answering to a dollar in the money of account"; and on p. 2118: "The Secretary of the Treasury is, on the whole strongly inclined to the opinion that a preference ought to be given to neither of the metals for the money unit. Perhaps, if either is to be preferred, it ought to be gold rather than silver."

²⁰ 1 Stat. 250.

²¹ Hamilton's expectations had been to the contrary. 2 *Annals of Congress* 2137.

²² 1 Stat. 300.

²³ U. S. Const. Art. I, Sec. 8.

²⁴ Congress, however, had already by the Act of July 31, 1789 [1 Stat. 29], established rates of foreign "coin and currency" for customs purposes. The time of operation of the legal tender provisions, narrowly limited by the 1793 Act, was extended by later enactments.

²⁵ 11 Stat. 163, 31 U.S.C. 374.

²⁶ These numerous acts are collected in Huntington and Mawhinney, *Laws of the United States Concerning Money, Banking and Loans*

It is important to note that the monetary systems of the several states had not been abolished by the federal statute of 1792. While the states, under that law, probably still had the power to make foreign, and perhaps even Federal coin a legal tender in terms of their own currency, namely colonial pounds, they do not seem to have later exercised that power. On the other hand, since the Spanish dollar had generally been incorporated into the colonial systems, and since the American dollar was equal to the Spanish, a definite ratio between the respective colonial units and the federal dollar followed as a matter of course. Thus the way was paved for the community to pass into the Federal monetary system. However, it seems that accounting in colonial money persisted locally for a number of years.²⁷

[Sen. Doc. No. 580, 61st Cong., 2d Sess. (1910)]. There still exists in the present law of the United States a venerable residue of the old law: "The pieces commonly known as the quarter, eighth, and sixteenth of the Spanish pillar dollar, and of the Mexican dollar, shall be receivable at the Treasury of the United States, and its several offices, and at the several post offices and land offices, at the rates of valuation following: The fourth of a dollar, or a piece of two real, at 20 cents; the eighth of a dollar, or a piece of one real, at 10 cents; and the sixteenth of a dollar, or half real, at 5 cents." 11 Stat. 163 (1857), 31 U.S.C. 374. Looking only at the metal value of the Spanish and Mexican coins (a 25-cent piece is worth 8 to 9 cents in silver bullion) exercise of the right flowing from the section quoted would still be advantageous.

²⁷ In New York an Act of Jan. 27, 1797, N.Y. Laws 1797, c. 9, "relative to the money of account in this state" as amended by an Act of March 21, 1801, N.Y. Laws 1801, c. 52, provided for the exclusive use of the dollar unit in judgments and in accounts of public officers; but no rule as to the conversion of pound contracts into dollar contracts seems to have been passed in New York. It is also illustrative that in *Scott v. Hornsby*, 1 Call. (Va.) 41 (1797) a sterling debt was judicially converted into local pounds rather than dollars, although the Act of Dec. 28, 1792 [Acts of 1792 c. 149] had directed conversion of money amounts expressed in the "laws of the Commonwealth" into dollars. (This direction was made broader in the Act of Feb. 18, 1819, c. 192.) Massachusetts adopted the dollar as the "money of account" of the state as early as 1794. Mass. Laws 1794, c. 42. Vermont followed in 1797, Laws of Vt. 1797, c. 42; Maryland as late as 1812 by a law the title of which is remarkable ("An Act recognizing the coin of the United States, and the value of foreign coins as established by the Acts of the Congress of the United States." Md. Laws 1812, c. 135.) In *Shelby v. Boyd*, 3 Yeates (Pa.) 321 (1801), the defendant's obligation was for £1000 "lawful money of North Carolina". The plaintiff refused to accept North Carolina paper money which was still circulating in North Carolina; he alleged that such money could not be legal tender under the Federal Constitution, Art. I, Sec. 10. The judgment went to the plaintiff on other grounds.

Stipulating in terms of Spanish milled dollars also locally survived the legislation of 1792. See *Christ Church Hospital v. Fuechsel*, 54 Pa. 71, at 73 (1867).

III. *The Dollar: 1792-1834*

Under the Act of 1792, half dismes were actually the first to be coined, namely, in October 1792;²⁸ silver dollars followed in 1794, dollar gold coins in 1795.²⁹ However, gold coins including foreign ones gradually began to leave the country, the 1:15 ratio being made ineffective through a rising gold market. At the same time the newly coined American silver dollars, popular in the West Indies for their fresh and bright appearance, were likewise exported, and there resulted a suspension by President Jefferson in 1806³⁰ of further coinage of silver dollars. Thus during the first period of the American System the coin stock of the country consisted mainly of "exogenous" elements such as foreign coin, more or less worn. Only the minor coins were domestic, and even they were partly "exogenous" inasmuch as copper cents issued under the authority of the Continental Congress³¹ were allowed to circulate for some time after the enactment of the law of April 2, 1792.³² Dollar notes on the basis of the Spanish dollar had been issued since the 'eighties by several banks,³³ and their example was followed by the first *Bank of the United States*, opened at Philadelphia December 12, 1791;³⁴ after the creation of the American dollar these notes became an important component of the national currency. The notes of the *Bank of the United States* started at amounts of \$5 and were, unlike state bank notes, receivable in all payments to the United States including customs.³⁵ Except for these notes, withdrawn in 1811 owing to the winding-up of the bank, the notes of the (Second) *Bank of the United States of America* (1816-1836)³⁶ and the treasury notes issued during the War of 1812, the need for circulating media was satisfied by state bank notes which were frequently of a dubious value.

²⁸ Hepburn, *A History of Currency in the United States* (1915) 45.

²⁹ Sumner, *A History of American Currency* (1874) 60.

³⁰ Watson, *History of American Coinage* (1899) 73.

³¹ *Supra*, p. 173, n. 5.

³² *Viz.* by the Act of May 8, 1792, sec. 2, 1 Stat. 283.

³³ Sumner, *A History of Banking in the United States* (1896) 12.

³⁴ Holdsworth and Dewey, *The First and Second Banks of the United States* [Publications of the National Monetary Commission, (1911)] 50.

³⁵ Act of February 25, 1791, sec. 10, 1 Stat. 191 at 196.

³⁶ Act of April 10, 1816, 3 Stat. 266; in addition to Holdsworth and Dewey, *op. cit. supra*, n. 34, see Catterall, *The Second Bank of the United States* (1903).

This first period of the American monetary system lasted until 1834. It was characterized by the fact that the bimetallic principle, embodied in the law, exhibited only its silver face; it was the white metal which in fact determined the value of the dollar.

IV. *The Dollar: 1834-1873*

In order to keep the fleeing gold in the country, a drastic step was taken, after years of deliberation, in the Act of June 28, 1834.³⁷ The gold content of the Eagle (and of the other gold coins, proportionably) was reduced from 247.5 to 232 grains; approximately 6 per cent. The standard weight of the Eagle was fixed at 258 grains, the alloy having been augmented from one twelfth to approximately one tenth. A statute of January 18, 1837,³⁸ for technical reasons increased the gold content of the Eagle a little, up to 232.2 grains, by establishing within the unaltered standard weight of the Eagle the exact alloy proportion of 1:10. The same ratio was applied to the silver coin, the standard weight of the silver dollar being lowered from 416 to 412.5 grains, with no change in the pure silver content (371.25 grains).

By adopting a gold-silver ratio of 16:1,³⁹ the 1834 legislation not only did away with the legal under-rating of gold coins but it enhanced their legal value about 3 per cent⁴⁰ above the market price of gold, which was approximately 15½ times the value of silver.⁴¹ The legislative measure therefore amounted to a devaluation of the dollar, and was cited in this sense by the *Legal Tender Cases*.⁴² Although coinage

³⁷ 4 Stat. 699. On the political background of this measure, see O'Leary, "The Coinage Legislation of 1834", (1937) 45 *J. Pol. Econ.* 80. One factor was the belief that the monetary predominance of silver favored the issue of banknotes, which was frowned upon at that time, particularly by President Jackson. That belief, caused by the greater difficulties of transporting silver, had already been referred to in Hamilton's report, *supra*, p. 174, n. 8, at 2118.

³⁸ 5 Stat. 136.

³⁹ More exactly 15.988:1. Hepburn, *op. cit. supra*, p. 178, n. 28, at 60.

⁴⁰ Hepburn, *op. cit.*, at 61; Sumner, *op. cit. supra*, p. 178, n. 29, at 109 states the value of the new gold dollar as 97.5 cents in terms of silver.

⁴¹ According to Sumner, *op. cit.*, at 109, the ratio was 15.6 to 1.

⁴² See *Knox v. Lee*, 12 Wall. (79 U.S.) 457, 548, 551, 565 (1871). However, some grave errors crept into the majority opinion, written by Mr. Justice Strong. On page 552 he points out that "the creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage."

of silver dollars was resumed after the passage of the Act, silver coins flowed out of the country, in dollars as well as in smaller coins.⁴³ Again, worn foreign silver coins remained. Although the bimetallic scheme of American legislation remained in force, it was now the gold which determined the value of the dollar. An improvement of the system was effected by a statute of February 21, 1853, which reduced by about 7 per cent the silver contents of the smaller coin up to the half dollar,⁴⁴ since the relative value of silver was then increasing because of the discovery of the gold fields in California. This reduction was sufficient to keep the coins in the country. Inasmuch as the legal tender quality of the new coins had been limited to sums not over five dollars, and silver dollars had not actually been in circulation, this Act constituted another step towards a gold standard. At the same time the now sufficient supply of subsidiary domestic coin enabled the government to take foreign coin out of circulation. This was accomplished by the Act of February 21, 1857.⁴⁵ Only American gold coin remained unlimited legal tender.

When, during the greenback period, gold coins were at a premium over paper money, the value of the dollar was no longer equal to the tenth part of the Eagle, but was determined by the market price of gold in terms of the dollar; in 1864, the dollar was temporarily valued at less than 40 per cent of its former gold value. But this fluctuating dollar continued as the common medium of exchange and of valuation, contributing to a universal rise of commodity prices and wages, and, in turn, to a decrease when the dollar recovered.⁴⁶ From the legal point of view, only one question, insig-

The day after, he was entitled only to a sum six per cent. less in weight and in market value, or to a smaller number of silver dollars" [italics the writer's]. But the creditor was never entitled to gold, the choice of the medium of payment being in the debtor. And of course the number of silver dollars to be employed in payments of a given sum was not made smaller by the law of 1834.

⁴³ This development, however, was delayed by dishoarding of silver coin and by other incidental factors. Dowrie, *Money and Banking* (1936) 38.

⁴⁴ 10 Stat. 160. There was no "free coinage" of the debased coins. For a detailed discussion of the Act, see Carothers, *Fractional Money* (1930) 122.

⁴⁵ 11 Stat. 163. See Carothers, *op. cit.*, 138.

⁴⁶ "Legal tender treasury notes have become the universal measure of values." Mr. Justice Strong in *Knox v. Lee*, 12 Wall. (79 U.S.) 457, 530 (1871). See the tables in Mitchell, *Gold, Wages and Prices under the Greenback Standard* (1908). The very meticulous work of

nificant to the economist, is presented on this score, namely, whether the gold coin despite its fluctuating premium retained the nature of money during this period. At least in respect to California, which remained on gold throughout the whole greenback period,⁴⁷ it has to be answered in the affirmative, thus giving another illustration of the society theory of money.⁴⁸ But apart from the California situation, the numerous exemptions provided by, or read into, the Legal Tender Acts⁴⁹ operated to uphold a certain medium-of-payment function of the coins. First of all, there probably was never a feeling in the nation that the gold coins, which were so amply available, had definitely ceased to be money; the expectation of an eventual redemption of the greenbacks had always persisted.⁵⁰ It was probably these considerations which actuated the courts in assuming the continuous money character of the gold coins and thereby the existence of a "dual" (parallel) standard of the dollar during the greenback period,⁵¹ save, of

the same author, *A History of the Greenbacks* (1903), is unfortunately concerned only with the period 1862-1866 for which it provides an overwhelming mass of material indeed.

⁴⁷ See Moses, "Legal Tender Notes in California", (1892) 7 *Quart. Jour. of Econ.* 1. California in 1863 and Nevada in 1864 enacted statutes facilitating the rendering of judgments in terms of gold coins, as a form of specific performance. Breckinridge, *Legal Tender* (1903) 158; Hunt, *A Treatise on the Law of Tender* (1903) 119. Such judgments seem to have become matter of routine so that they would sometimes be ordered by the courts though the plaintiff did not require this form. Cf. *Belford v. Woodward*, 158 Ill. 122, 41 N.E. 1097 (1895), and California cases cited therein.

⁴⁸ *Supra*, p. 27.

⁴⁹ See *infra*, p. 204.

⁵⁰ This is the reason why, as a measure of protection to bondholders, Congress, during the greenback period, by the Act of March 18, 1869, 16 Stat. 1, 31 U.S.C. 731, postponed redemption of the United States bonds. Payment of the principal was not to be forced upon them until and unless the greenbacks became convertible into coins. See *Smyth v. United States*, 302 U.S. 329 at 360 (1937). The doctrine of the text would probably not be true, at present, in the case of the English sovereigns, which have disappeared from circulation since 1914. See *Auckland Corp. v. Alliance Ins. Co.* [1937] A.C. (Privy Council, 1937), cf. also *supra*, p. 50, n. 75.

⁵¹ *Bronson v. Rodes*, 7 Wall. (74 U.S.) 229 (1868); *Butler v. Horwitz*, 7 Wall. (74 U.S.) 258 (1868); *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871); *Thompson v. Butler*, 95 U.S. 694 (1877) [holding a sum of 5000 gold dollars not to reach the jurisdictional amount of "more than \$5000" as provided by the *Federal Judicial Code*]; *Norman v. Baltimore and Ohio R. R.*, 294 U.S. 240 (1935); cf. *Woodruff v. Mississippi*, 162 U.S. 291 (1895). *Contra: United States v. American Gold Coin*, 24 Fed. Cas. No. 14,439 (C.C. Mo. 1868). In *Bush v. Baldrey*, 93 Mass. 367 (1865), the money property of American gold coins was used by the court to calculate the dollar value of freight advances received by a New York captain of a freighter in San Francisco. The

course, in cases where the coins were traded in as commodities.⁵²

This, to be sure, was done on a very large scale. In New York, in addition to the Stock Exchange, no fewer than three gold markets sprang up.⁵³ People from all walks of life speculated in gold.⁵⁴ This speculation reached its climax on September 24, 1869, "Black Friday", when the price of gold, cornered by Mr. Gould and Mr. Fisk, was jerked upward from 143 to 160, only to plunge, within 15 minutes, to 133, owing to intervening selling orders of the government.⁵⁵ Recollection of those events may have been a factor in the nationalization of gold in 1933.

The dual-currency problem vanished when the gold premium disappeared in 1878⁵⁶ in the face of the imminent resumption of specie payments on greenbacks, which was to begin on January 1, 1879, under the so-called Resumption Act of January 14, 1875.⁵⁷

V. *The Dollar: 1873-1933*

During the greenback period silver dollars circulated as little as before, since the silver premium first appearing after the Act of 1834 continued with fluctuations up to 1873. Rating the value of the paper dollar in terms of silver was entirely out of the question. It was nothing but the confirmation by law of existing factual conditions when Congress, by the so-called Coinage Act of February 12, 1873,⁵⁸ struck the silver dollar from the list of money to be coined. This meant the end of bimetallism and the establishment of gold as the only standard of the dollar. At that very time silver en-

court held that the coins, being legal tender, should be debited to the captain at their nominal value, in spite of their New York premium. The special monetary situation of California was not referred to by the court.

⁵² *Peabody v. Speyers*, 56 N.Y. 230 (1874); *Fowler v. Gold Exchange Bank*, 67 N.Y. 138 (1876). See also *Gay's Gold*, 13 Wall. (80 U.S.) 358 (1872).

⁵³ Mitchell, *A History of the Greenbacks* (1903) 182.

⁵⁴ Mitchell, *op. cit.*, at 185.

⁵⁵ The exciting story of the corner and its failure is narrated in Barrett, *The Greenbacks and Resumption of Specie Payments 1862-1879* (1931) 84; see also Henry Adams' Report in Van Doren, *An Autobiography of America* (1929) 621.

⁵⁶ See the tables in Hepburn, *op. cit. supra*, p. 178, n. 28, at 253.

⁵⁷ 18 Stat. 296, sec. 3.

⁵⁸ 17 Stat. 424 at 427, sec. 16.

tered its long road of decline, extending through the following decades, and the agitation of the silver party for the reestablishment of the "dollar of the fathers" set in with the cry, among others, that abrogation of the silver dollar was accomplished surreptitiously by "The crime of 1873".⁵⁰ While the various phases of the developing fight for and against bimetallism and more specifically for and against restoration of the silver dollar, are of extraordinary economic and political interest, the only fact pertinent to the present discussion is that free coinage of the silver dollar was never resumed. The silver party succeeded, however, in having the silver dollar restored to its original standard of 371.25 grains as unlimited legal tender by the Bland-Allison Act of February 28, 1878.⁵¹ Moreover, the Treasury was directed, by this Act and its substitute, the Sherman *Silver Purchase Act* of July 14, 1890,⁵² to purchase and monetize⁵³ silver in large quantities. The

⁵⁰ Section 9 of the Act of Jan. 18, 1837 [5 Stat. 136 at 137], provided "that of the silver coins, the dollar shall be of the weight of 412½ grains; the half dollar of the weight of 206¼ grains; the quarter dollar of the weight of 103½ grains; the dime. . . ." Section 15 of the 1873 Act prescribed "that the silver coins of the United States shall be a trade dollar, a half-dollar, or fifty cent piece, a quarter-dollar, or twenty-five cent piece, a dime, or ten cent piece; and the weight of the trade dollar shall be 420 grains troy. . . . [follow the weights of the other silver coins]; and said coins shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment". Obviously the gap, wrought through the elimination of the silver dollar, was filled by the trade dollar, a novel creation, which might be misapprehended, and which was entirely out of place on this score. The long and verbose Act, containing 67 sections, has no explicit indication of the historically important legislative decision contained in it, the title running innocently "An Act revising and amending the laws relative to the mints, assay offices, and coinage of the United States". The heading "An Act establishing the gold standard of the dollar, and abrogating the silver dollar", would have been more candid, but would certainly have aroused bitter resistance. Great efforts have been made to show that the bill was given careful attention in Congress and that one or the other of the legislators who later on joined in the battle cry of "Crime of 1873" knew or *should have known* the true meaning of the bill. Hepburn, *op. cit. supra*, p. 178, n. 28, at 271; McCleary, *The Crime of 1873*, (1900) 7 *Sound Currency* 154. This may be true but the defenders of the legislative proceeding have rather strengthened the impression that the abandonment of bimetallism was only casually touched upon in the debates and could easily have been overlooked by most of the legislators.

⁵¹ 20 Stat. 25, sec. 1, 31 U.S.C. 316. The veto of President Hayes against the bill was overridden.

⁵² 26 Stat. 289.

⁵³ By coining silver dollars and by issuing Silver Certificates and Treasury Notes, both backed by, and payable in silver dollars; the Treasury Notes were also payable in gold coin at the discretion of the Treasury. The Treasury Notes feature was added by the Sherman Act.

increasing business prosperity of the country helped to support this silver load, kept within reasonable size by the upright and fearless efforts of President Cleveland.⁶³ The dangerous silver purchase policy was abandoned after the failure of the famous free silver Presidential campaign of William Jennings Bryan in 1896. Ultimately, the so-called Gold Standard or Parity Act of March 14, 1900,⁶⁴ prescribing gold redemption of United States and Treasury notes, provided that "the dollar consisting of 25-8/10 grains of gold 9/10 fine shall be the standard unit of value". The additional direction that "all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity" stated only a self-evident corollary of the gold dollar system,⁶⁵ although in some indistinct way it sounds bimetallic and was probably so meant. The same is true of another section of the Act, reserving possible cooperation for the "accomplishment of international bimetallicism."⁶⁶ In fact the practical impossibility of a national bimetallicism was thus officially certified.⁶⁷

⁶³ See Taussig, *The Silver Question in the United States* (1894).

⁶⁴ 31 Stat. 45, 31 U.S.C. 314. The customary title "Gold Standard Act" is not the official one, which reads, somewhat timidly, as follows: "An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes." The term "Parity Act" is to be found in *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 198 N.E. 671 (1935), and elsewhere.

⁶⁵ *Supra*, p. 140. The statutory phrase cited rests on the language of the Act of Nov. 1, 1893, 28 Stat. 4, 31 U.S.C. 311, reproduced in n. 67, *infra*, which sets out the policy of the United States as to bimetallicism.

⁶⁶ 31 Stat. 45 at 49, sec. 14, 31 U.S.C. 313. "International monetary conference commissioners" were already provided by the *Bland-Allison Act* and by the Act of March 3, 1897, sec. 1, 29 Stat. 624, 31 U.S.C. 312.

⁶⁷ 31 U.S.C. 311, still reiterates the harmless generalities of the Act of Nov. 1, 1893, 28 Stat. 4: "It is hereby declared to be the policy of the United States to continue the use of both gold and silver as standard money and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. And it is hereby further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallicism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts." These pronouncements are still considered "the general policy of the United States as to bimetallicism" in 37 Op. Att. Gen. 344 (1933), but being

SECTION 17

THE PRESENT DOLLAR

I. Devaluation

After sixty years of operation the gold standard of the dollar broke down in 1933 under the stress of economic depression.¹ In view of the "heavy and unwarranted withdrawals of gold and currency" from the American banks "for the purpose of hoarding" and considering that "continuous and increasingly extensive speculation abroad has resulted in severe drains upon the Nation's stock of gold"² the President, by a memorable Proclamation of March 6, 1933, instituted Bank Holidays prohibiting the banks, under penalty, from making payments;³ and at the same time the Treasury of the United States ceased employing gold or gold certificates in any payments whatsoever.⁴ Hence, United States notes, as well as gold certificates, became irredeemable. The reopening of the banks was authorized by an Executive Order of March 10, 1933, with the proviso that gold payments must not be made except under authority of the Secretary of the Treasury.⁵ Thus reestablishment of banking operations fell short of making

attenuated if not contradicted by the Gold Standard Act and by the emphasis laid on *international* bimetalism they possess very little significance.

¹ For an economic analysis and criticism of the monetary development since 1933, see Harris, *Exchange Depreciation* (1936); Paris, *Monetary Policies of the United States 1932-1938* (1938) and many others.

² During February, 1933, and until March 6, 1933, \$476,100,000 in gold was withdrawn for export and hoarding from the Federal Reserve Banks and the United States Treasury. Simultaneously the demand for currency for the same purposes increased the circulation of currency by about \$1,840,000,000. 1933 *Federal Reserve Bulletin* 212.

³ Proclamation No. 2039 of March 6, 1933, 48 Stat. 1689, 12 U.S.C.A. 95 note, relying on questionable grounds [Act of October 6, 1917, sec. 5(b), 40 Stat. 411 at 415, 50 U.S.C.A. App. 5(b), a war emergency regulation] but approved of and confirmed by the Emergency Banking Relief Act of March 9, 1933 [48 Stat. 1, 12 U.S.C. 95b] and prolonged under the same Act, by Proclamation No. 2040 of March 9, 1933, 48 Stat. 1691, 12 U.S.C.A. 95 note.

⁴ Instruction of March 6, 1933, by the Secretary of the Treasury, approved by the President; reproduced in the brief of the government in *Nortz v. United States*, 294 U.S. 317 (1935).

⁵ Executive Order of the President, No. 6073, of March 10, 1933, 12 U.S.C.A. 95 note.

gold available to holders of Federal Reserve and National Bank Notes. Seizure by the government of coins, gold bullion and gold certificates soon followed.⁶ Through the discontinuance of gold payments, the tie between the dollar and gold was cut; the gold standard was abandoned and the dollar began to depreciate. This process, although originally forced upon the country by the adverse conditions mentioned by the President was afterwards, to a certain extent, welcomed and promoted by the Government as a measure of policy to relieve the debtor class and enhance the price level.⁷ The question whether devaluation of the dollar was wrought by deliberate action of the government⁸ can be answered both in the affirmative and in the negative. Perhaps it may be said that while abandonment of the gold standard was unavoidable, the degree of the depression of the dollar was chiefly determined by voluntary action of the government.

After a factual stabilization had been reached, the President under the Thomas Amendment (so-called Inflation Act) to the *Agricultural Adjustment Act* of May 12, 1933, section 43(b) (2) as amended by the *Gold Reserve Act* of 1934, section 12,⁹ by Proclamation of January 31, 1934,¹⁰ fixed "the weight of the gold dollar to be 15-5/21 grains nine tenths fine", a devaluation reducing the dollar to 59.06 per cent. of

⁶ *Supra*, p. 70, n. 41, now the *Gold Reserve Act* of 1934, 48 Stat. 337, 31 U.S.C. 440 *et seq.* and the Treasury's *Provisional Regulations Issued under the Gold Reserve Act of 1934* have reshaped the law. Property in gold owned by the Federal Reserve Banks was vested, on Jan. 30, 1934, in the United States by the *Gold Reserve Act*, sec. 2(a), 31 U.S.C. 441; the banks receiving as compensation dollars according to the old legal parity. The next day the dollar was devalued. Constitutionality of this proceeding was vindicated in 37 Op. Att. Gen. 403 (1934) and recognized by the reasoning of *Nortz v. United States*, 294 U.S. 317 (1935), *infra*, sec. 29 at II.

⁷ For a description of the monetary developments in 1933, see Bradford, *Money and Banking* (4th ed., 1937) 68; Paris, *op. cit.*, *supra*, n. 1, at 15.

In *Nye v. Schwab*, 58 Ohio App. 422, 16 N.E. (2d) 783 (1938), the defendant, a mortgagor, asserted that the legislative policy to depressing the purchasing power of the dollar and giving relief to the debtor class was "wrongfully" and "corruptly" thwarted by the Federal Reserve System in conspiracy with the "money lenders". The defendant, relying on the law of usury, demanded therefore a reduction of his debt. The Court pointed out, with great care, the immateriality of the confused defense.

⁸ The Appellate Court of Hamburg, Nov. 12, 1936, calls the devaluation of the dollar an "artificial measure of monetary technique". Sack und Meyer-Collings, *Gold- und Valuta-Klausel* (1937) 133, 137.

⁹ 48 Stat. 31 at 52, 337 at 342, 31 U.S.C. 821(b)(2).

¹⁰ Proclamation No. 2072, 48 Stat. 1730, 31 U.S.C. 821 note.

its former gold parity, and establishing a new parity corresponding to a price of \$35 for one ounce of fine gold. The power vested in the President by the Act to devalue the dollar during the emergency period¹¹ down to 50 per cent of its former (1837) level, was expressly reserved by the Proclamation. No "gold dollar" as envisaged by the Proclamation, was coined. On the contrary, after the "nationalization" of gold was accomplished the minting of gold coin was expressly discontinued and existing coins were to be formed into bars under the *Gold Reserve Act* of January 30, 1934.¹² There are no longer lawful United States gold coins.

We have then, following the "depreciation" a "devaluation" of the dollar with no "debasement" of gold coin. The legal significance of the 1934 Proclamation lies only in its determination, binding on all agencies of the government, that the policy to be followed with regard to the dollar-gold ratio, should be the maintenance in the market of the price of \$35 for one ounce of fine gold.¹³ Reference to the hypothetical, or rather fictitious, gold coin is nothing but the employment of a familiar formula, devoid of its original significance, for the definition of the ideal unit of the monetary system. As before, the value of this unit is by law exclusively tied up with the value of gold. In order to carry out the law, the Secretary of the Treasury may purchase or sell gold, as public interest requires,¹⁴ and a stabilization fund of two billion

¹¹ The emergency period expiring Jan. 30, 1937, was prolonged by Act of Jan. 23, 1937, sec. 2, 50 Stat. 4, until June 30, 1939.

¹² 48 Stat. 337, 31 U.S.C. 440 *et seq.*

¹³ See *supra*, n. 13.

¹⁴ Apart from the stabilization fund [see *infra*, n. 15], the Secretary is authorized to "sell gold in any amounts, at home or abroad, in such manner and upon such terms as he may deem most advantageous to the public interest . . ." provided, however, that he may sell the gold which is required to be maintained as a reserve or as security for currency issued by the United States, only to the extent necessary to maintain such currency at a parity with the gold dollar. *Gold Reserve Act* of 1934, sec. 9, 48 Stat. 337 at 341, 31 U.S.C. 733. This is a reshaping of the law of March 17, 1864, 13 Stat. 404, 31 U.S.C. 733, empowering the Secretary "to dispose of any gold . . . not necessary for the payment of interest on the public debt". The power of the Secretary of the Treasury to *purchase* gold was established by the *Gold Reserve Act*, sec. 8, 48 Stat. 337 at 341, 31 U.S.C. 734, literally reiterating the broad qualification set up by sec. 9, with the proviso, however, of "any provision of law relating to the maintenance of parity, or limiting the purposes for which any of such obligations, coin or currency [being the purchase price] may be issued . . . to the contrary notwithstanding." It can perhaps be inferred from either of the provisos in secs. 8 and 9, that the exercise of the authority

dollars for that purpose was appropriated for the emergency period.¹⁵ While the gold purchased may be used as reserve for gold certificates, creative of credit expansion, or may be "sterilized", that is, simply exchanged for currency by the Treasury, disposal of gold may be effectuated through redemption, in gold bullion, of gold certificates held by the Federal Reserve Banks.¹⁶ Redemption is made mandatory insofar as it is necessary in the judgment of the Secretary "to maintain the equal purchasing power of every kind of currency in the United States".¹⁷ However, the equality of paper dollars and silver coin as to purchasing power was never imperiled and could not possibly have been the subject of legislative consideration at the time of the enactment. It seems simply that the legislature has again preserved the traditional (though somewhat qualified) formula¹⁸ because it sounds rather bi-metallistic and can, moreover, do no harm. Legally it is apparently meaningless and does not impose any real limitation upon the power of the Secretary. To be sure, under section 3(a) of the *Gold Reserve Act*, the Secretary of the Treasury "shall", "with the approval of the President", "prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked" for definite purposes set out in the law such as the settling of international balances,¹⁹ but this is not mandatory either, the "conditions" to be prescribed being within the discretion of the Secretary. As a matter of fact, he has announced his willingness to dispose of the Treasury's gold, if necessary, for the protection of the dollar.²⁰ And under the *American-British-French Tripartite Agreement* of 1936²¹ the

conferred upon the Secretary is entirely subordinate to the purpose of stabilizing the dollar at the ratio prescribed by the law. Still, the texts cited decidedly lack the clarity which one would expect at this vital point.

¹⁵ *Gold Reserve Act*, sec. 10, 48 Stat. 337 at 341, 31 U.S.C. 822a, as amended by Act of Jan. 23, 1937, sec. 2, 50 Stat. 4.

¹⁶ *Gold Reserve Act*, sec. 6, 48 Stat. 337 at 340, 31 U.S.C. 408a. As a matter of fact, delivery of gold is being made exclusively by the Federal Reserve Bank of New York, 1936 *Federal Reserve Bulletin* 852.

¹⁷ *Gold Reserve Act*, sec. 6, 48 Stat. 337 at 340, 31 U.S.C. 408a.

¹⁸ The formula appears first in the Act of November 1, 1893, requiring, however, "maintenance of the parity in value of the coins of the two metals". 28 Stat. 4, 31 U.S.C. 311.

¹⁹ 48 Stat. 337 at 340, 31 U.S.C. 442.

²⁰ 1934 *Federal Reserve Bulletin* 69; 1936 *Federal Reserve Bulletin* 852. See also *Provisional Regulations Issued Under the Gold Reserve Act of 1934*, sec. 28. (Treas. Dept.)

²¹ *Supra*, p. 157.

American government has undertaken, under certain conditions, to buy gold from or sell it to the other two governments at the American legal ratio (\$35 for an ounce of fine gold), subject, however, to handling charges of $\frac{1}{4}$ per cent.²²

In view of this situation, it has correctly been stated by Professor Bradford²³ that the present monetary system is not based upon a gold bullion standard proper; but he still characterizes the monetary condition of today as a sort of "qualified" or "limited" gold bullion standard. In this respect he can hardly be followed. Not only have holders of gold certificates (the Federal Reserve Banks) no right to receive gold bullion, but the law does not even clearly define the duty of the government with regard to the disposal of its gold stocks. The policy adopted by the government rests on political considerations rather than on legal obligations which customarily are supposed to exist if one speaks of a monetary "standard". The cautiously qualified American-British-French agreement, if it be a treaty,²⁴ may obligate the American government to buy and sell gold. Otherwise the executive decrees of the Secretary of the Treasury²⁵ form the only legal basis of the practice described.

The wide discretion left by the legislative to the executive branch of the American government is, however, limited in that the dollar is not to be allowed to exceed 60 per cent (or to fall below 50 per cent) of its former value. Therefore, the administration cannot lower the price of gold appreciably despite an undesirable afflux to the United States of this metal. Nor can such lowering be accomplished by indirection either, as, for instance, by arbitrary "handling charges" of the Treasury or by import or other taxes upon gold. Nor may the Treasury allow the \$35 rate only to American producers and refuse to buy foreign gold, since such a proceeding would result in lowering gold prices, in terms of the dollar, in the world market. The world market price of gold, however, being the only available comparatively objective measure, is the test of the legal ratio between the monetary unit and the

²² 1936 *Federal Reserve Bulletin* 852.

²³ Bradford, *Money and Banking* (4th ed., 1937) 90.

²⁴ *Supra*, p. 157.

²⁵ They are authorized by 48 Stat. 337 at 341, secs. 8, 9; 31 U.S.C. 733, 734.

gold value. If this ratio under the pressure of inflowing gold is to be shifted in favor of the dollar, it can only be done by Congress.

II. *The Silver Legislation*

Dollar depreciation and devaluation and existing general political conditions facilitated a renewed "cheap money" attack by the silver party. In spite of the sharp decrease in the intrinsic value of the silver dollar, Congress began to pave the way for bimetallism. By the "Thomas Amendment",²⁶ the President was authorized to fix the weight of the silver dollar at a definite ratio in relation to the gold dollar and to provide for the unlimited coinage of gold and silver at the ratio so fixed.²⁷ Since the American public is not disposed toward an extensive use of the heavy dollar coins, the issuance of silver certificates on the basis of any silver held or acquired by the Treasury was likewise authorized. The fundamental bimetallic tendency of these provisions was, to be sure, contradicted, and perhaps nullified through the simultaneous enactment, or rather legislative reiteration, of the rule that the *gold dollar* "shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, . . ." ²⁸ Nor is *free coinage* of silver ordained by the Statute.²⁹ That the real purpose of the Act was not monetary but to assure a profit to American silver producers, appeared in the statutory provisions giving the President discretion to make different terms and conditions for acquisition of silver of domestic production and that of foreign production; a sincere bimetallism is obviously workable only on the basis of international market conditions.

²⁶ May 12, 1933, sec. 43b (2) as amended by the *Gold Standard Act of 1934*, sec. 12, 48 Stat. 31 at 52 and 337 at 342, 31 U.S.C. 821(b) (2).

²⁷ The bimetallic or inflationary dreams of the legislators were so bold as to induce them to authorize a reduction in the weight of the standard silver dollar in the same percentage as the President reduces the weight of the gold dollar. 48 Stat. 337 at 343, sec. 12, 31 U.S.C. 821(b) (2), par. 5. As to gold coin, the President's authority for unlimited coinage was soon superseded by the coinage prohibition of the *Gold Reserve Act*, cited *supra*, p. 187, n. 12.

²⁸ See *Gold Standard Act* of March 14, 1900, sec. 1, 31 Stat. 45, 31 U.S.C. 314.

²⁹ "Congress having carefully avoided the more frequent phrase *free and unlimited*." 37 Op. Att. Gen. 334 at 349 (1933).

The President did not fix a gold dollar-silver dollar ratio, but authorized the acquisition by the Treasury of domestic silver at a rate far higher than the market price.³⁰ The deliverer of silver was not paid a purchase price, but received the monetary value (\$1.2929) of a fine ounce,³¹ less a deduction of 50 per cent "as seigniorage and for services performed by the Government" charged to the deliverer, with his "voluntary consent".³² While the amount of the deduction is somewhat excessive for a royalty such as "seigniorage",³³ that term and the avoidance of terms like "purchase", "price" and "seller" is at variance with prior silver purchase enactments³⁴ and apparently constitute a theoretical concession to free coinage of silver and therefore to the ideology of bimetallism. The practical result of this lip service to bimetallism may be to make the law of sales inapplicable to silver transactions under the Thomas Amendment.³⁵

³⁰ Proclamation No. 2067 of Dec. 21, 1933, 48 Stat. 1723, 31 U.S.C. 821 note, prescribing an equivalent of 64.64 cents (half the value of 1.2929) for the ounce of fine silver. The market price of the ounce was then about 43.5 cents.

³¹ This value is expressly indicated in all of the Proclamations of the President cited in the following note.

³² Proclamation No. 2067, cited *supra*, n. 30. The spread of the deduction was subsequently changed by Proclamations No. 2092 (August 9, 1934), No. 2124 (April 10, 1935), and No. 2125 (April 24, 1935), 49 Stat. 3402, 3445, 31 U.S.C.A. 821 note. By Proclamation No. 2268 (Dec. 30, 1937), 31 U.S.C. 821 note, the 50 per cent ratio was restored. The President's power to order that acquisition of silver was questionable under the Thomas Amendment but was clarified by the *Gold Reserve Act*, sec. 12, 48 Stat. 337 at 342, 31 U.S.C. 821(b)(2) pars. 2-4.

³³ The amount of the seigniorage had raised doubts of legality within the government which were found groundless in 37 Op. Att. Gen. 344 (1933). Generally, however, discounts of this size are termed "profits" rather than "seigniorage". 3 Palgrave, *Dictionary of Political Economy* (1925), *sub nomine* "seigniorage".

³⁴ *E.g.*, the Bland-Allison Act of February 28, 1878, 20 Stat. 25, and the Sherman Silver Purchase Act of July 14, 1890, 26 Stat. 289. Only the expression "seigniorage" (or "gain or seigniorage". Sherman Act, sec. 3) is sometimes to be found in the statutes before 1933. See 37 Op. Att. Gen. 344, 348 (1933).

³⁵ Theoretically it might be concluded from the "seigniorage" doctrine that the deliverer of silver would retain his property right in the silver not absorbed by "seigniorage" and in the dollars coined from it; but the opposite result follows distinctly from the President's direction, having the force of law, that "there shall be returned [to the deliverer of silver] therefor in standard silver dollars, silver certificates, or any other coin or currency of the United States the monetary value of the silver so received . . . less such deduction. . . ." This phrase suggested by 38 Op. Att. Gen. 89 (1934) was first used in the Proclamation of April 10, 1935, and was taken over by the following proclamations, *supra*, n. 32.

Not content with this success, the silver party pushed the *Silver Purchase Act* of June 19, 1934, through Congress.³⁶ This Act pronounced the policy of the United States to be, that the proportion of silver to gold in the monetary stocks of the United States should be increased with the ultimate objective of having one fourth of the *monetary* value of such stocks in silver.³⁷ In order to carry out this policy, the Secretary of the Treasury was authorized freely to purchase silver at home or abroad (the latter would amount to real purchases) and to place silver certificates in an amount not less than the cost of the purchases "in actual circulation";³⁸ simultaneously, in order to prevent speculative forestalling of silver, the President was given power to requisition it.³⁹ This he did by his Executive order of August 9, 1934,⁴⁰ which, however, allowed very broad exemptions.

The subsequent formidable influx of gold into the United States tremendously increased the dangers resulting from this legislation, since the quantity of silver to be purchased rose automatically in proportion to the amount of gold. The fact that the monetary value, which is considerably above the market value of silver, has to be used in calculating the fourth part of the value of the monetary stocks, the characterization of the objective of the Act as "ultimate", and general economic development, have so far allowed the administration to avert the disastrous results of this legislative action. From a legal viewpoint, the duty imposed upon the Treasury to place silver certificates in circulation on a large scale may be emphasized. It is responsible for the tremendous increase in circulating silver certificates;⁴¹ an increase counterbalanced to a great extent, however, by the withdrawal of National Bank Notes.⁴² The spread of the certificates gives the American currency which in reality is grounded upon enormous gold holdings a *silvered* surface. This situation reflects in a curious manner the contrast between politics and sound reason in American monetary administration. The Silver Purchase Act feigns to

³⁶ 48 Stat. 1178, 31 U.S.C. 448 *et seq.*

³⁷ *Silver Purchase Act*, sec. 2, 48 Stat. 1178, 31 U.S.C. 311a.

³⁸ *Silver Purchase Act*, sec. 5, 48 Stat. 1178, 31 U.S.C. 405a.

³⁹ *Silver Purchase Act*, sec. 7, 48 Stat. 1178, 31 U.S.C. 316a.

⁴⁰ No. 6814, 31 U.S.C. 316a note.

⁴¹ Amounting, on Nov. 30, 1937, to \$1,312,378,354.

⁴² See *infra*, p. 195.

be a monetary measure. In fact it is nothing but an appropriation of public moneys to silver interests.⁴³

In the international field the United States, eager to support the silver market, succeeded in concluding a treaty with several silver mining countries, designed to increase the monetary use of silver and to restrict its sale by the signatory governments.⁴⁴ This treaty which was the only palpable result of the 1933 World Economic Conference in London, expired on December 31, 1937.⁴⁵

III. *Constituents of the American Monetary System*

The numerous constituents of the American monetary system, past and present, reflect the contrariety innate in the American national psychology. On the one hand, there is the tenacious clinging to tradition. This is apparent in the fact that the silver dollar and its subdivisions, the bulk of American coinage, are still substantially the same as they were in 1794 (or at least in 1853, as to the subdivisions), and appears also in the striking slogan *dollar of the fathers*; on the other hand, an extraordinary aptitude for experimentation, inherited as was seen, from colonial times, a multitude of remarkable peculiarities and even curiosities, which make the American system a mine of phenomena illustrative of monetary theory. There have been private coins;⁴⁶ legal tender dependent upon weight;⁴⁷ foreign coins and trade coins which are legal tender;⁴⁸ bimetallistic, single, and dual standards;⁴⁹ "currency" bearing interest;⁵⁰ Federal bank notes and State bank notes existing side by side; bank notes with no liability

⁴³ Fifty per cent of the excess of the price over cost and expenses is, as a rule, taken away by taxation. *Silver Purchase Act*, sec. 8, 48 Stat. 1178, 26 U.S.C. 904a. For the economic and political aspects of the matter, see Westerfield, *Our Silver Debacle* (1936); Paris, *Monetary Policies of the United States, 1932-1938* (1938) 42.

⁴⁴ Text of the Treaty, 48 Stat. 1879 (1933); Ratification by Proclamation No. 2067, 48 Stat. 1723, 31 U.S.C. 821 note. See Leavens "Five Years of Silver Subsidy", (1938) 51 *The Annalist* 4.

⁴⁵ Regarding the conference, see S. E. Thomas, *The Principles and Arithmetic of Foreign Exchange* (1934) 402; Pasvolksy, *Current Monetary Issues* (1933).

⁴⁶ Up to 1864, private gold coins were in circulation. *Supra*, p. 27.

⁴⁷ *Supra*, p. 51.

⁴⁸ *Supra*, pp. 69, 115, 177.

⁴⁹ *Supra*, pp. 173, 174, 181, 182.

⁵⁰ *Supra*, p. 80, at n. 16; *infra*, p. 202, n. 16.

of the bank to the holder;⁵¹ paper money backed by trust funds;⁵² paper money exchangeable for bonds;⁵³ parallelism of paper money payable exclusively in gold coin and payable exclusively in silver coin;⁵⁴ and all sorts of vicious paper money.⁵⁵

Fortunately, however, not very much of the former variety survives. Gold coin has been seized, and its coinage discontinued; only the silver dollar, although unpopular and not in circulation in the greater part of the country, has persisted, and so have subsidiary and minor coins. United States notes, issued during the greenback period in an amount between 300 and 400 million dollars, are kept in circulation only under an outmoded Act of 1878.⁵⁶ The Thomas Amendment authorized the issuance of an additional three billion dollars of United States notes,⁵⁷ but this power never having been exercised, such notes no longer constitute a considerable part of the currency.⁵⁸ Treasury notes which were, in law, virtually identical with United States notes,⁵⁹ have been withdrawn from circulation by the government. Gold certificates⁶⁰ are no

⁵¹ Namely, Federal Reserve Notes, which are obligations of the Federal government rather than of the Federal Reserve Bank of issue. *Supra*, p. 80, n. 20.

⁵² United States notes, gold certificates, silver certificates. See 31 Stat. 45, sec. 4 (1900), 31 U.S.C. 146.

⁵³ Act of Feb. 25, 1862, sec. 1, 12 Stat. 345 [greenbacks].

⁵⁴ United States notes and gold certificates on one hand; silver certificates on the other.

⁵⁵ Continentals, state bank notes, clearing house certificates and other emergency media of circulation.

⁵⁶ Act of May 31, 1878, 20 Stat. 87, 31 U.S.C. 404. On Nov. 30, 1938, circulation amounted to \$269,484,839.

⁵⁷ 48 Stat. 31 at 52, sec. 43(b)(1), 31 U.S.C. 821 (b)(1).

⁵⁸ There were, on Nov. 30, 1937, outstanding \$1,168,022. Withdrawal from circulation may be sound policy, but is contrary to the law.

⁵⁹ Except that Treasury notes may be in the nature of bonds bearing interest. This type of Treasury Note is not contemplated here. Practical conformity of the law on Treasury notes and United States notes appears from 31 U.S.C. 401, 408, 408a, 452, 453. The last two sections indicate some differences, insignificant indeed, with regard to the legal tender quality of the notes. Another slight discrepancy of a temporary and past importance is pointed out in 20 Op. Att. Gen. 317 (1892), referring to the Act of June 8, 1872, 17 Stat. 336, repealed, 31 Stat. 45 at 47, sec. 6 (1900). Financially, however, the term "Treasury notes" has a connotation, which ordinarily indicates that the notes mostly serve as an anticipation, for technical reasons, of Treasury revenues; they are ordinarily a part of the "floating debt". 3 Palgrave, *Dictionary of Political Economy* (1925), *sub nomine* "Treasury bills".

⁶⁰ 31 U.S.C. 408a, 428, 429. See Simmons, "The Gold Certificate", (1936) 44 *J. Pol. Econ.* 534. The forms and denominations of the new certificates are determined by the Secretary of the Treasury. *Gold Reserve Act of 1934*, 48 Stat. 337, 31 U.S.C. 441. The occurrence of old gold certificates as authorized by the Acts of March 3, 1863, sec. 5,

longer money; they have changed in legal nature even as securities, since no claim to gold coins is embodied in them. Although still backed by gold,⁶¹ they only evidence a government debt which, in the case of the new certificates held by a Federal Reserve Bank as security for its notes, may be discharged by a delivery of any currency rather than by payment in gold.⁶² State bank notes have long been suppressed.⁶³ National Bank notes are in the process of being withdrawn from circulation, the government having in 1935 redeemed the United States bonds carrying the circulation privilege. By depositing such bonds with the Treasury, the banks had acquired the privilege of issuing notes to the same amount, subject to certain qualifications.⁶⁴

The Federal Reserve Banks have issued two types of paper money. The so-called Federal Reserve Bank notes⁶⁵ name the bank as debtor. Originally authorized as a means of replacing National bank notes, and, in 1933 as an emergency measure, they are no longer employed. The Federal Reserve notes, which constitute obligations of the federal government, can normally only be issued on the basis of eligible commercial paper serving as collateral security.⁶⁶ However, for an emergency period instituted by the government in 1934 and not yet terminated, the banks have been permitted under the Glass-Steagall Act⁶⁷ to use as security for the notes direct

12 Stat. 709 at 711 and March 14, 1900, sec. 6, 31 Stat. 45 at 47; 31 U.S.C., secs. 428 and 429 is explainable by the fact that certificates which were outside the United States at the time of the several requisitions were not affected by the requisitioning decrees until they had been imported into this country. Moreover, unlike gold, gold certificates requisitioned but not delivered are not forfeited. The holder is, in any case, entitled to the face amount of dollars.

⁶¹ But probably no longer as a *trust fund*. See n. 62. The trust fund provision ought to be changed accordingly.

⁶² *Supra*, p. 185. Redemption in gold of U. S. currency is forbidden by the sweeping provision of *Gold Reserve Act* of 1934, sec. 6, 48 Stat. 337 at 340, 31 U.S.C. 408a.

⁶³ *Supra*, p. 88, n. 6-8; *infra*, p. 200, n. 9.

⁶⁴ Act of June 3, 1864, 13 Stat. 99, as amended by Act of March 14, 1900, secs. 10-12, 31 Stat. 45 at 48, 49 (1900), 12 U.S.C. 101 *et seq.* There were still outstanding on Nov. 30, 1938, \$203,082,605.

⁶⁵ Their statutory denomination is "circulating notes" of the Federal Reserve Banks. Act of Dec. 23, 1913, sec. 18, 38 Stat. 251 at 268, 12 U.S.C. 441. On Nov. 30, 1938, their circulation amounted to \$28,527,176.

⁶⁶ *Supra*, p. 85, n. 39. There were in circulation on Nov. 30, 1938, \$4,349,314,030.

⁶⁷ Act of March 6, 1934, 48 Stat. 398, 12 U.S.C. 412; extended by Proclamation No. 2117 of Feb. 14, 1935, 49 Stat. 3437, and by Act of March 1, 1937, 50 Stat. 23, 12 U.S.C. 412. The Glass-Steagall Act itself dates from 1932, 47 Stat. 57.

obligations of the United States in lieu of commercial paper, which is not available in sufficient amounts owing to unfavorable business conditions. Thus the basis for the issue of Federal Reserve notes has been enlarged considerably.

Silver certificates require somewhat more detailed discussion. Issued by the government they are redeemable in silver coin—being, perhaps, the last pillar of redeemability—and are to their full amount backed by silver held in trust by the Treasury.⁶⁸ The former inscription on the certificates—“one silver dollar payable to the bearer on demand”—was replaced, apparently in 1934, by the formula “one dollar payable in silver, to the bearer, on demand”. This change enabled the Treasury to redeem the certificates in subsidiary coin of inferior intrinsic value.⁶⁹ As a matter of fact, the President, by the Thomas Amendment, was authorized to issue silver certificates “against any silver bullion, silver, or standard silver dollars in the Treasury not then held for redemption of any outstanding silver certificates, and to coin standard silver dollars or *subsidiary* currency for the redemption of such certificates”.⁷⁰ This provision, by implication, allows the new type of silver certificates to be redeemed in subsidiary coin; that the provision is hidden amidst a confusing mass of highly technical and involved sentences makes it a late revenge, as it were, of the silverites for the “Crime of 1873”. The result seems to be clear. However, the *Silver Purchase Act*, enacted on June 19, 1934, ordains that “all silver certificates . . . shall be redeemable on demand at the Treasury of the United States in standard silver dollars, and the Secretary of the Treasury is authorized to coin standard silver for such redemption”.⁷¹ Under these conditions it is very difficult to justify the new formula used by the government. The latter's legal theory can only be conjectured. Perhaps the government understands the provision of the 1934 law to refer only to silver certificates issued on the basis of silver newly purchased under that Act. Such a construction would be at variance with the broad language used by the provision and would, inci-

⁶⁸ Act of February 28, 1878, sec. 3, 20 Stat. 25 at 26, as amended, 31 U.S.C. 146, 405, 405a, 821(b)(2) par. 4.

⁶⁹ *Supra*, p. 68.

⁷⁰ 48 Stat. 31 at 52, sec. 43(b)(2), 31 U.S.C. 821(b)(3) (*italics supplied*).

⁷¹ 48 Stat. 1178, sec. 5, 31 U.S.C. 405a.

dentally, necessitate a separate statement in the monthly Treasury returns of the two parts of the silver stocks, distinguished under the theory presumed. At any rate, the apparent and serious ambiguity of the law should have prevented the government from adopting the new form since the eventual annulment by the courts of the certificates could lead to grave inconveniences. Considering the difference in silver content between the silver dollar and subsidiary coin, the financial effect is an expansion by almost seven per cent of what might be called the currency productivity of the silver stocks of the government. However, their "monetary value", so important for the calculation of quantities still to be purchased, fails to be increased correspondingly since the *Silver Purchase Act* has provided for a definition of monetary value of the silver stocks in terms of standard silver dollars.⁷² That all of the present constituents of the dollar system have been made unlimited legal tender has been shown in the discourse on legal tender.

It follows from the preceding discussion that as to paper money, only Federal Reserve notes, silver certificates and, to a much smaller degree, United States notes, have remained the common media of payment. The legal position of the Federal government is paramount in this field. Whereas the banks issuing Federal Reserve notes must have a forty per cent reserve of gold certificates obtainable exclusively from the government,⁷³ the government itself has almost unlimited power to issue United States notes up to the three billion dollar limit⁷⁴ and silver certificates up to the tremendous "monetary" value of the government's silver holdings. Moreover, and contrary to a tradition maintained even in Fascist countries, the monetary stocks of precious metals are not owned by a central note-institution (which in this country would be the Federal Reserve System) but by the government itself. While of course these legal viewpoints should not be over-stressed, still the fact remains that a democratic country such as the United States is in the van of legal development in this respect, and it must be recognized that there

⁷² 48 Stat. 1178 at 1181, sec. 10, 31 U.S.C. 448b, par. 4.

⁷³ 48 Stat. 337 at 338, sec. 2(3)(4), 12 U.S.C. 413.

⁷⁴ 48 Stat. 31 at 52, sec. 43(b)(1), 31 U.S.C. 821(b)(1).

is an apparently irresistible and universal trend toward concentrating the monetary power in the hands of the government.

SECTION 18

CONSTITUTIONAL ASPECTS OF THE AMERICAN MONETARY SYSTEM

I. *Coins and the Constitution*

There is no difficulty in demonstrating the constitutionality of Federal coinage and the unconstitutionality of state coin. While the *Articles of Confederation* of July 9, 1778, Article IX, confined the "sole and exclusive right and power" of the Federal Government to "regulating the alloy and value of coin struck by their own authority, or by that of the respective states", under the United States Constitution, Article I, Section 10, "no state shall coin money" or "make anything but gold and silver coin tender in payment of debt", and according to Section 8 "the Congress shall have power . . . to coin money, regulate the value thereof, and of foreign coin". Thus the national government was entitled, to the exclusion of the states,¹ at least to establish a metallic monetary system and, of course, to take legislative and administrative measures appropriate to the development and alteration of the system in adaptation to changing conditions. That the Federal government could also debase the standard coin by a devaluation of the dollar, was made evident in 1834 when the content of the gold dollar was diminished 6 per cent,² by a statute enacted by a tremendous majority and without legal objections to the debasement itself.³ As to legal tender, the

¹ See Washington, J., in *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 at 265 (1827). As to the tax tokens issued by some states, see *Morrow v. Hannsford*, 182 Wash. 625, 47 P.(2d) 1016 (1935), discussed *supra*, p. 64, n. 11. On the assumption that the tokens are money, the court seems not to be prepared to take up the constitutional problem until the federal government sees fit to question the state's use of tokens. This seems to be a highly disputable constitutional doctrine. See (1936) 36 *Columbia L.R.* 317.

² 4 Stat. 699. The Act of 1834 is discussed *supra*, p. 179.

³ Hepburn, *op. cit. supra*, p. 178, n. 28, at 59; Breckinridge, *Legal Tender* (1903) 91. The "protest" mentioned by Breckinridge, referring [at page 92, n. 2] to 10 *Cong. Deb.* 4665, 4669 (1834), was not of a legal nature. However, Daniel Webster believed that Congress had no power to demonetize coins. See Dewey, *Financial History of the United States* (12th ed., 1934) 71.

Constitution, Article I, Section 10, only forbids the states to "make anything but gold and silver coin a tender in payment of debts". This language seems to indicate that the power of making a thing legal tender was intended to be exclusively vested in the states, subject, however, to the qualification mentioned. But by the time of the enactment of the Coinage Act of 1792,⁴ it had already been conceded that the coinage power granted to the federal government, like the coinage power of the English Crown, included the right to make the coin legal tender.⁵ Thus, from the very beginning of national monetary administration the tendency towards centralization, so sound and natural in that field, extended beyond the letter of the Constitution.

II. Paper Money: Negative Power of Congress

Article I, Section 10, of the Constitution provides that "no state shall . . . emit bills of credit". This prohibition which goes back to the English Acts of 1751 and 1763 embraces any "paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society".⁶ Strangely enough this very unmistakable interdiction of the Constitution was twisted and made inoperative during the Jacksonian period, by the decision in 1837 of the Supreme Court in *Briscoe v. The Bank of the Commonwealth of Kentucky*.⁷ The holding in that case was that the emission of paper money in the form of banknotes, issued by a bank wholly owned, financed and managed by the state, would not constitute an emission "by the state", the core of the argument being that a bank unlike a state could be sued by the holder of such notes. In 1834, the Court,

⁴ *Supra*, p. 174.

⁵ *Supra*, p. 44. In later debates of Congress (1797 and 1834) theoretical objections against the legal tender power of the Federal Government were sometimes voiced by individual orators [Breckinridge, *op. cit.* at 89, 94, n. 2] but this had no influence upon the course of events.

⁶ See *Craig et al. v. The State of Missouri*, 4 Pet. (29 U.S.) 410 (1830); *Briscoe v. Commonwealth*, 11 Pet. (36 U.S.) 257 (1837).

⁷ 11 Pet. (36 U.S.) 257 (1837). As to the political and economic significance of the case, see 2 Warren, *The Supreme Court in United States History* (Rev. ed., 1935) 27; Bates, *The Story of the Supreme Court* (1938) 144; Sumner, *A History of Banking in the United States* (1896) 144. Money notes of the State of Missouri, disguised as "loan certificates" were held unconstitutional in *Craig et al. v. The State of Missouri*, 4 Pet. (29 U.S.) 410 (1830).

under Chief Justice Marshall, had decided the other way.⁸ Two justices had, however, been absent, and no majority of the entire Court having been secured the Chief Justice directed a re-argument. While the 1837 judgment was quite in line with President Jackson's anti-Federal Bank policy, it was easily assailable from the legal angle. Mr. Justice Story was aroused by indignation to deliver a monumental dissenting opinion which made the decision an outstanding one in the history of the Supreme Court. Fortunately, the case lost its factual significance by the federal legislation of 1865 and 1866, which practically destroyed the State bank notes by imposing a ten per cent tax upon them.⁹ These acts were upheld by the Supreme Court,¹⁰ Chief Justice Chase, former Secretary of the Treasury and father of the *National Bank Act*, writing the opinion, which culminated in this pronouncement: ". . . Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, its attempts to secure a sound and uniform currency for the country must be futile".¹¹ An absolute prohibitive power of the federal government was thus established in the field of monetary law.

To be sure, action by Congress is necessary for the weeding out of undesirable paper money. This view points a solution to the problem of the issuance by American cities of "Tax Anticipation Notes" or "Scrip" of one dollar and other money-like amounts not bearing interest, which circulate, and are apparently designed to circulate, as money. At present, there is no federal statute explicitly interfering with the issuance of these city notes. However, the constitutional prohibition against the emission of "bills of credit" by the states

⁸ *Briscoe v. Commonwealth*, 11 Pet. (36 U.S.) 118 (1834).

⁹ Act of March 3, 1865, sec. 6, 13 Stat. 469 at 484, and July 13, 1866, sec. 9 [bis], 14 Stat. 98 at 146. *Supra*, p. 88.

¹⁰ *Veazie Bank v. Fenno*, 8 Wall. (75 U.S.) 533 (1869). The opinion, written by Chief Justice Chase, stated that the greenbacks, "until after the close of the war were always convertible into, and receivable at par for bonds payable in coin, and bearing coin interest". This reads as if the greenbacks had until then been, at least indirectly, redeemable in coin. However, convertibility of the greenbacks had been abolished as early as March 3, 1863 [12 Stat. 709 at 710, sec. 3, last sentence] and this had been suggested by Mr. Chase himself who was then Secretary of the Treasury. Mitchell, *op. cit. supra*, p. 182, n. 53, at 115-117. Through this misstatement the impression is given that Chief Justice Chase was not responsible for that decisive change in the greenback situation.

¹¹ *Veazie Bank v. Fenno*, 8 Wall. (75 U.S.) 533 at 549 (1869).

should be interpreted as extending to subdivisions of a state.¹² The doctrine of the *Briscoe* case, being confined to notes of a bank, and of an ostensibly private one, cannot be relied upon for a contrary view. The total undesirability of city money needs no exposition; it is somewhat surprising that the Federal administration has not taken cognizance of this desultory infiltration of illegitimate paper money into the channels of monetary circulation.

III. Paper Money: Affirmative Power of Congress

The establishment of affirmative national powers necessary for the complete effectiveness of the federal monetary system was beset with greater difficulties than the setting up of defenses against encroachment. The question of the legality of federal paper money is most obscure under the letter of the Constitution. Yet, as early as 1816, the famous case of *McCulloch v. Maryland*¹³ established the power of the federal government to create national banks of issue, protecting their issues against destructive state taxation which had been undertaken not only by Maryland, but also by Tennessee, Georgia, Kentucky, and other states.¹⁴ As to the issue of paper money by the federal government itself, the original draft of the Constitution proposed to authorize the federal government to emit "bills of Credit of the United States", but this phrase was eventually struck out "with diverse view of members".¹⁵ Thus, the question remained open. Practically, however, the issuing power of the federal government was freely exercised. "Treasury Notes" carrying the privilege

¹² The notes (scrip) of some New Jersey cities, to which the discussion in the text is addressed, carried the inscription: "United States of America, State of New Jersey. City of . . ." These phrases obviously pose as geographical data but may give rise to the impression of a liability or responsibility of the federal and State governments. By *N. J. Rev. Stat.* (1937) 40:2-56ff., the State of New Jersey had authorized municipalities and counties to borrow by tax anticipation notes and scrip against their prospective tax receipts for the following year. Such a law, of course, cannot be understood to authorize the issuance of moneylike notes, not bearing interest and physically resembling regular dollar notes as has been done in the case of scrip. Persons paying out such notes might be liable to a ten per cent tax, *supra*, p. 88.

¹³ 4 Wheat. (17 U.S.) 316 (1819).

¹⁴ Catterall, *op. cit. supra*, p. 178, n. 36, at 64.

¹⁵ Mr. Justice Bradley in *Knox v. Lee*, 12 Wall. (79 U.S.) 457 at 559 (1871). For an extensive discussion of the debates in the Constitutional Convention, see Breckinridge, *Legal Tender* (1903) 74.

of public receivability, were issued as early as the War of 1812¹⁶ and a part of them which lacked definite provision for redemption and bore no interest, commonly circulated as media of payment.¹⁷ Yet, it was not until the Civil War that the federal government issued legal tender notes ("greenbacks"). This was accomplished under the great pressure of an emergency, by several Acts of Congress ("Legal Tender Acts") passed from 1862-1864,¹⁸ after other means of financing had failed. These Acts created a note issue totalling 450 million dollars. The United States thus adopted a means of war financing used previously and subsequently by many belligerent powers, including the Confederacy. The notes depreciated, reaching the nadir in July, 1864, when they dropped to less than forty per cent of their nominal gold value, but subsequently, and after some reverses, they gradually regained their par in 1878.¹⁹ This deflationary process caused many individual injuries and grievances,²⁰ but they were the price paid for the contribution made by the greenbacks toward winning the war. Among the seventeen state jurisdictions called upon to pass on the constitutionality of the Legal Tender Acts, sixteen responded affirmatively.²¹ By a similar majority, even express contractual provisions for gold payment were invalidated, as violating the Acts.²²

¹⁶ Dewey, *op. cit. supra*, n. 3, at 135, 234. In 1843, the Secretary of the Treasury under an Act of Oct. 12, 1837, 5 Stat. 201, had issued notes of \$50, bearing interest at .001 per cent (*sic*), redeemable after a year, and purchasable in coin at par on presentation. Obviously these terms were evasive, amounting, in fact, to forbearance of interest and to redeemability on demand. Hence, by a Resolution of the House of Representatives, they were declared unconstitutional on the theory that they constituted "bills of credit" (which was true) allegedly withheld from the powers of the federal government by the Constitution. H.R. Rep. No. 379, 28th Cong., 1st sess. (1843), and Cong. Globe, 28th Cong., 1st sess. (1843) 454, 460.

¹⁷ Hepburn, *A History of Currency in the United States* (1915) 90.

¹⁸ Acts of Feb. 25, 1862, sec. 1, 12 Stat. 345; March 17, 1862, sec. 2, 12 Stat. 370; July 11, 1862, sec. 1, 12 Stat. 532; Jan. 17, 1863, 12 Stat. 822 at 823; March 3, 1863, sec. 3, 12 Stat. 709 at 710 and June 30, 1864, sec. 2, 13 Stat. 218.

¹⁹ Hepburn, *op. cit.*, tables at 204, 227, 253.

²⁰ The economics of the greenback period have been thoroughly investigated by Mitchell, *op. cit.*, and Barrett, *op. cit. supra*, p. 182, n. 55.

²¹ Only the Kentucky Court of Appeals, by a divided opinion, dissented. *Hepburn v. Griswold*, 2 Duv. (63 Ky.) 20 (1865). The cases are collected in Dawson and Cooper, "Northern Inflation Cases", (1935) 33 *Mich. L.R.* 858, n. 169.

²² For a collection of these cases, see Dawson, "The Gold Clause Cases", (1935) 33 *Mich. L.R.* 674, n. 54.

When the case of *Hepburn v. Griswold*, challenging the constitutionality of the greenbacks, reached the Supreme Court in 1867, there was a general sentiment that the Court, as part of the federal government, would feel, even more strongly than the state courts, the obligation to uphold the basic measure used in financing the war. Moreover, once the greenbacks were issued, and had with the approval of the state courts created and discharged numberless pecuniary relationships, public and private, invalidation of the Legal Tender Acts was bound to "cause throughout the country great business derangement, widespread distress, and the rankest injustice"; it would even "take hold of the possible continued existence of the government".²³ However, after more than two years of deliberation, on February 7, 1870, the court by a four to three vote²⁴ held that the greenbacks were not good tender as to prior contracts, primarily on the ground that under the opposite theory the obligation of contracts would be impaired in violation of the due process clause of the Fifth Amendment. The holding amounted practically to an invalidation of the whole of the Acts, which was also suggested by the language of the opinion. Thus the highest federal tribunal took a strong anti-national attitude which is in striking contrast to the extreme pro-national attitude of the State courts. The opinion was written in emphatic terms by Chief Justice Chase who as Secretary of the Treasury had himself sponsored and certified as constitutional the Legal Tender Acts.²⁵ But during the same day, and while the opinion was being read, President Grant sent to the Senate the names of two new Justices, Strong and Bradley.²⁶ On March 25, 1870,²⁷ four days after their confirmation, the Attorney General asked for reconsideration of the Legal Tender Acts in some other cases. On April 11, a new majority of the Court, consisting of the former minority together with Justices Strong and Bradley, contradicted the thesis of the former majority that

²³ Language of Mr. Justice Strong in *Knox v. Lee*, 12 Wall. (79 U.S.) 457 at 529 (1871).

²⁴ *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1869). Mr. Justice Grier (see *infra*, p. 205) had resigned shortly before the opinion was handed down.

²⁵ Mitchell, *op. cit. supra*, n. 19, at 62, 92, 114.

²⁶ 2 Warren, *op. cit. supra*, p. 199, n. 7, at 516. By an Act of April 10, 1869, 16 Stat. 44, the original number of nine members of the Supreme Court had been restored.

²⁷ 2 Warren, *op. cit.*, at 519.

the cases were disposed of by *Hepburn v. Griswold*.²⁸ While the new cases were soon withdrawn by the respective plaintiffs, the country was confident that *Hepburn v. Griswold* would be reversed.²⁹ Hence the effects of the decision on the money market were only slight,³⁰ and havoc was averted. Indeed the entire constitutionality of the Acts was recognized, through the new majority, by a five to four vote, in the *Legal Tender Cases*, *Knox v. Lee*, and *Parker v. Davis*,³¹ decided on May 1, 1871, on the ground that means of self-preservation could not be withheld from a sovereign power such as the United States. This line of reasoning, which should never have been denied, seemed dependent on the necessities of warfare. However, thirteen years later, in *Juilliard v. Greenman*,³² the court held constitutional the re-issue, authorized by Congress and carried out by the Treasury in peace time, of redeemed greenbacks. The power of Congress to emit legal tender notes was now established by the Court as a self-evident attribute of sovereignty and as a resulting from the tax, borrowing, and other express powers granted by the Constitution. "Its [*the Congress*'] power to define the quality and force of these notes [*the circulating notes issued for the money borrowed*] as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under these two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the National Government or private individuals".³³ Thus currency powers not inferior to the power of any other government were secured to the United States.³⁴

The Legal Tender Acts had exempted from their effect "duties on imports and interest on the public debt".³⁵ The

²⁸ 2 Warren, *op. cit.*, at 525; Bates, *op. cit. supra*, p. 199, n. 7, at 184.

²⁹ *Hepburn, op. cit.*, at 258; Breckinridge, *op. cit.*, at 131.

³⁰ See Hart, *Salmon Portland Chase* (1899) 398.

³¹ 12 Wall. 79 (U.S.) 457 (1871).

³² 110 U.S. 421 (1884).

³³ *Juilliard v. Greenman*, 110 U.S. 421 at 448 (1884). The italicized words are supplied.

³⁴ The state legislatures have power to supplement the efforts of Congress in the monetary field, *Hancock v. Yaden*, 121 Ind. 366, 23 N.E. 253 (1889), *e.g.*, State suppression of counterfeiting, *supra*, p. 32, n. 40.

³⁵ *Cf.* the Acts cited *supra*, p. 202, n. 18. Maintenance of gold payments in interest on the public debt purported, of course, to buttress the public credit which was then subject to a severe test.

courts added further exemptions of still greater significance. Not only were the states held entitled to require payment in gold of their taxes,³⁶ but provisos in private contracts calling for payment in gold or *in specie* were upheld in the teeth of the acts,³⁷ contrary to the general attitude of the State courts.³⁸ Considerable concessions were thus made to the "hard-money" doctrine, the actual outcome being somewhat in the nature of a compromise.³⁹

Apart from their juridical and financial importance, the *Legal Tender Cases* are among the most momentous occurrences in the history of the Supreme Court. Within fifteen months, the Court had entirely changed its attitude with regard to a question vital to the nation,⁴⁰ one judge, Mr. Justice Grier, even having shifted during the deliberations of *Hepburn v. Griswold* from the constitutionality group to the opposition.⁴¹ The uncommonly protracted duration of this case, which, despite the urgency of the matter, had been pending for more than two years in the Supreme Court, was another striking fact. Grave animosity between the two groups within the court appeared in the conference on the rehearing of the constitutional question, and later crystallized in mutual accusation placed upon the record.⁴² Particularly puzzling had been the course followed by the Chief Justice. Originally a supporter and initiator of the Acts, he became a thoroughly bitter antagonist condemning his own statecraft.⁴³ He even

³⁶ On the feeble ground that *debts public* payable under the Act in greenbacks would not include state taxes, *Lane County v. Oregon*, 7 Wall. (74 U.S.) 71 (1868).

³⁷ *Bronson v. Rodes*, 7 Wall. (74 U.S.) 229 (1868); *Butler v. Horwitz*, 7 Wall. (74 U.S.) 258 (1868); *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871); cf. *Gregory v. Morris*, 96 U.S. 619 (1877).

³⁸ See *supra*, n. 22.

³⁹ For the legal analysis of the cases, see particularly Thayer, *Legal Essays* (1908) 60; Breckinridge, *Legal Tender* (1903), 132.

⁴⁰ Many debtors relying on *Hepburn v. Griswold* had paid their creditors in gold. Despite *Knox v. Lee*, they did not succeed in recovering the premium. *Troy, Adm'r v. Bland*, 58 Ala. 197 (1877); *Flower v. Lance*, 59 N.Y. 603 (1875). See also *Harris v. Jex*, 55 N.Y. 421 (1874); *Doll v. Earle*, 59 N.Y. 638 (1874).

⁴¹ Breckinridge, *op. cit.*, at 167, 168.

⁴² See Breckinridge, *op. cit.*, at 160 (particularly the *statement of facts* signed by the Justices Swayne, Miller, Davis, Strong, and Bradley, at p. 161).

⁴³ This riddle is not as yet entirely solved. In *Hepburn v. Griswold* the Chief Justice remarks that the time of the Legal Tender Laws was not favorable to a considered reflection upon the constitutional limits of the legislative or executive authority, but this is only an acknowledgement of the fact that the issuance of the greenbacks was imposed on the government, as a matter of self-defense, under the pressure of

pushed the fight between the contesting groups of the court to its extreme, perhaps driven by an impulse to overcompensate for the feeling of weakness in his situation.⁴⁴ The chief executive himself, President Grant, became involved in the controversy inasmuch as he was charged with having *packed* the court by the appointment of Justices Strong and Bradley. Floods of ink have been used to prove and disprove the charge.⁴⁵ Although the balance is in favor of the President, an unambiguous conclusion has hardly been reached except to establish that no promise or declaration was demanded from or given by the new justices. However, there were circumstances from which the President could infer the views of the two justices.⁴⁶ Considering the political importance of the question, he was entirely justified in taking into account the presumable opinion of the appointees.⁴⁷ Indeed President Lincoln had done the same when he nominated Mr. Chase as Chief Justice,⁴⁸ although with less success.

It is understandable why *Knox v. Lee* should not have found much acceptance and why it should have met with

the exigencies of war. At the same time, this pressure, and the motive of self-defense which actuated Congress, constituted matters of legal significance. Probably Chief Justice Chase was angered by Congress which again and again had postponed redemption of the greenbacks [Hepburn, *op. cit.*, p. 202, n. 17, at 207 *et seq.*] and thereby had frustrated the performance of a promise given by him. His misstatement in *Veazie Bank v. Fenno*, *supra*, p. 200, n. 10, tending to exonerate himself for the non-accomplishments of redemption, gives some support to this hypothesis. Still the dilatory attitude of Congress was not referred to in his opinions, and was legally irrelevant. So, too, a lack of poise also appears in the Chief Justice's dissenting opinion in *The Vaughan and Telegraph*, 14 Wall. (81 U.S.) 258 (1872) where he inveighs hopelessly against the *Legal Tender Cases*. Probably, considering his political responsibility for the Legal Tender Acts, it would have been better if he had refrained from participating in the hearing.

⁴⁴ See the confidential letter of Miller, J., published by Fairman, "Justice Samuel L. Miller", (1935) 50 *Pol. Sci. Q.* 15, 26.

⁴⁵ Hoar, *The Charge Against President Grant* (1896); A. B. Hart, *Salmon Portland Chase* (1899) 1389; 2 Warren, *op. cit. supra*, p. 199, n. 7, at 517; Cormack, "The Legal Tender Cases—A Drama of American Legal and Financial History", (1929) 16 *Va. L.R.* 132; Smith, "Neglected Evidence on an Old Controversy", (1929) 34 *Am. Hist. R.* 532; Sachs, "Stare Decisis and the Legal Tender Cases", (1934) 20 *Va. L.R.* 856; Ratner, "Was the Supreme Court Packed by President Grant?" (1935) 50 *Pol. Sci. Q.* 343, and historical and biographical writings referred to by Ratner.

⁴⁶ See Breckinridge, *Legal Tender* (1903) at 130. Mr. Justice Strong, as a member of a Pennsylvania Court, had already voted for the constitutionality of the Acts.

⁴⁷ The writer has taken this view already in *Das Geld* (1925) 135.

⁴⁸ Bates, *op. cit. supra*, p. 199, n. 7, at 172.

violent criticism.⁴⁹ It is, however, astounding that not even the nearly unanimous decision in *Juilliard v. Greenman* should have settled the question definitively. And while the course of events has fully demonstrated the clear inevitability, perhaps deplorable, of *Knox v. Lee*, still, as late as 1935 a writer could advance the opinion that the *Legal Tender Cases* are irreconcilable with the Constitution.⁵⁰ It is the traditional hard-money sentiment, irritated by persistent inflationary movements, which is behind such a criticism, just as it is behind the disapproval of the *Gold Clause Cases*.⁵¹ However, if it comes down to sentiments, the patriotic sentiment which may have actuated the majority in *Knox v. Lee* is certainly of no less weight.

In both *Briscoe v. The Bank of the Commonwealth of Kentucky* and in the *Legal Tender Cases*, we are confronted with swift and violent reversals of the Supreme Court on questions the answer to which involved the highest responsibility to the nation—both reversals being associated with grave symptoms of a political nature and being unique in the history of the Supreme Court.⁵² Clashes on monetary grounds between the judiciary and the legislative branch of the government have even appeared in preconstitutional times.⁵³ All this suggests the social and political tensions innate to monetary law.

⁴⁹ See G. Bancroft, *A Plea for the Constitution of the United States of America Wounded in the House of Its Guardians* (1886). See also Laughlin, *Principles of Money* (2d ed., 1919) 490. Of course, *Hepburn v. Griswold*, too, had aroused strong objections. Kemmerer, *Money* (1935) 264, alleging some instances, speaks of a "storm of protest".

⁵⁰ Jerome, *Governments and Money* (1935) 175, 177. Very remarkable are the contrasting views of two important historians of the Supreme Court. While 2 Warren, *op. cit. supra*, p. 199, n. 7, at 499, calls the Legal Tender Acts a "legalized cheating", Bates, *op. cit. supra*, p. 199, n. 7, at 185 feels that the decisions upholding the Act "gave Congress a highly necessary power over the currency and benefited the mass of American citizens". See also Zerkowich in (1935) 29 *Ill. L.R.* 1058, at 1072 and Eder, "The Gold Clause Cases in the light of history", (1935) 23 *Geo. L.J.* 722, at 752.

⁵¹ See *infra*, sec. 29 II.

⁵² Regarding a somewhat comparable reversal of the highest Alabama Court, see *infra*, sec. 24, n. 16.

⁵³ In *Trevett v. Weeden*, Rhode Island judges refused to enforce a statute ordering the sale of commodities for paper money whereupon the Legislature resolved (but did not carry out the resolution) to have the judges removed from office. Chandler, *American Criminal Trials* (1844) 267; Thayer, *Cases on Constitutional Law* (1895) 73. It may also be mentioned that in 1744 the General Assembly of Massachusetts set aside the finding of a committee of judges in the valuation of the "new tenor" bills of credit. Willard C. Fisher, "The Tabular Standard in Massachusetts History", (1913) 27 *Quart. Jour. Econ.* 416, 424.

IV. Indirect Currency Power of Congress

The question remains whether the currency power of Congress may be capable of even further expansion. The authority given to Congress "to regulate the value" of money⁵⁴ can be construed very widely. Attempts have frequently been made, in America,⁵⁵ and elsewhere to regulate the value of money by price maxima, compulsion to sell, and similar oppressive measures. May Congress, in case of emergency, constitutionally inaugurate a similar policy? The value-regulating clause of the Constitution could hardly supply a sufficient justification since it has invariably been understood to mean that Congress may regulate the legal value of the several coins as by the use of the special power "to regulate the value of foreign coin"⁵⁶ to give foreign coin a definite legal value; that is, the clause bears upon the value in terms of the monetary unit.⁵⁷ Again, the general currency power as developed by the Supreme Court is apparently confined to the strictly monetary field. In the *Gold Clause Cases*, the Court took great pains to justify the constitutionality of gold clause abrogation on technical monetary grounds rather than on the assumption of an indirect currency power.⁵⁸ What seems not

⁵⁴ U. S. Const. Art. I, Sec. 8.

⁵⁵ *Supra*, sec. 4 I.

⁵⁶ U. S. Const. Art. I, Sec. 8. *Of.* also the significant phrase of the Articles of Confederation, *supra*, p. 198 ("regulating the alloy and value").

⁵⁷ A helpful discussion of the value-regulating clause is to be found in Dawson, "The Gold Clause Decisions", (1935) 33 *Mich. L.R.* 647, 668. Collier, "Gold contracts and currency regulations", (1938) 23 *Corn. L.Q.* 520, 528 asserts that the clause empowers the Congress to regulate the *purchasing power* of money. His reason is that attribution of an intrinsic and extrinsic value to coin being included in the "coinage" power, "value regulating" must mean something more, and that this "more" is regulating the purchasing power. He offers neither historical nor other evidence for this far-reaching proposition. See next footnote.

⁵⁸ *Infra*, sec. 29 II. In *Hart Coal Corp. v. Sparks*, 7 Fed. Supp. 16 (D.C.W.D. Ky., 1934), the general counsel of the National Recovery Administration had "tentatively" advanced the argument that the Federal Government might be empowered by the value-regulating clause to relate the value of money to the wages of labor. Said the Court (at 28): "I am satisfied that no reputable court would so construe the provision of the Constitution."

In *Hancock v. Yaden*, 121 Ind. 366, 23 N.E. 253 (1889), the court erroneously subsumed the *Truck Acts*, *supra*, p. 102, n. 16, under the regulating value clause, but this was only done to justify the constitutionality of state truck acts, as an alleged aid to Federal monetary legislation, *supra*, n. 34.

to be so remote, however, is the assumption by Congress of legislative power over *deposit currency* and particularly over check accounts, inasmuch as the check device has particularly profound repercussions upon the currency.⁵⁹ Legislative measures could be passed requiring a license or financial guarantees for the deposit business. Since deposits kept with Federal Reserve Banks, National Banks and other member-banks of the Federal Reserve System, and, of course, with banks owned by the federal government, are subject to federal legislation anyhow, the range of the question is considerably reduced; namely, to deposits held with state banks not members of the Federal Reserve System. And even these banks are subject, with regard to their deposits, to federal regulation to the extent to which they have joined the Federal Deposit Insurance.⁶⁰ However, since a number of the state banks can not yet be reached by federal legislation, a situation may be created in which desirable restrictions on bank deposits can not be fairly and efficiently carried through against the federal group since the independent state group would not be affected.

The question arises whether Congress may extend general deposit regulation to this group.⁶¹ *American Bank and Trust Co. v. Federal Bank of Atlanta* may have a certain bearing on this problem.⁶² In that case, the defendant Federal Reserve Bank, pursuant to a policy adopted by the Federal Reserve Board, had undertaken to force a state bank into the Federal Reserve System by means which remind one strikingly of the fight of the Bank of the United States against the state banks.⁶³ The Federal Reserve Bank accumulated checks upon the state banks and then required them to maintain so much cash in their vaults as to drive them out of

⁵⁹ It has been estimated that about ninety per cent of business transactions in the United States are carried on through the medium of checks. Kemmerer, *The A.B.C. of the Federal Reserve System* (1932) 8-11.

⁶⁰ *Cf.* (1936) 36 *Columbia L.R.* 809 n. 56.

⁶¹ An opinion of the general counsel of the Federal Reserve Board [1933 *Fed. Res. Bull.* 166] points out that Congress even has power to create a unified commercial banking system. Among the means recommended for that end he proposes, *e.g.*, forbidding state banks to receive deposits subject to withdrawal by checks, forbidding federal officers from doing business with state banks and other measures of a legally or politically disputable character.

⁶² 256 U.S. 350 (1921).

⁶³ Catterall, *op. cit. supra*, p. 178, n. 36, at 62.

business or to join the Federal Reserve System, either as a member or as a holder of a non-member clearing account; the purpose was to compel the keeping of a much larger reserve by the state banks than had previously been kept. (Many subsequent failures of state banks probably would thereby have been avoided.) Still, the Court, enjoining the defendants, considered their method an unwarranted "sort of warfare upon legitimate creations of the States."⁶⁴ A number of southern states even took the offensive against the Federal Reserve System in authorizing or directing state banks to make a charge ("exchange") for the outside payment (namely, payment through a clearing house or by remittance of a draft on the drawee's deposit in some reserve city) of checks drawn on them. These state enactments ran contrary to the *par clearance* rules and policy of the Federal Reserve System, aimed, for reasons of public welfare, at simplification, unification and cheapening of the general "check" intercourse; however, the acts were held constitutional by the Supreme Court.⁶⁵ The point was stressed among others that the state acts were not in conflict with the federal legislation (Federal Reserve Act).⁶⁶ Thus the question of the constitutionality of federal legislation as to bank deposits was not disposed of.⁶⁷ Despite the uncertainties inherent in most constitutional problems not yet definitely settled by the Supreme Court, it is not likely that a vigorous states rights attitude will determine the views of the Court in monetary cases. The policy of the Court in this field was established by

⁶⁴ Opinion by Mr. Justice Holmes, 256 U.S. 350 at 359 (1921).

⁶⁵ *Farmers' and Merchants' Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649 (1923). This remarkable opinion was written by Mr. Justice Brandeis. See also *Farmers' and Merchants' Bank of Cattleburg v. Federal Reserve Bank of Cleveland*, 286 Fed. 610 (E.D. Ky., 1922); *Brookings State Bank v. Federal Reserve Bank of San Francisco*, 281 Fed. 222 (D.C. Ore., 1922). Detailed discussions of the "par clearance controversy" may be found in 2 Zollmann, *Banks and Banking* (1936) 259, and (at great length) in Spahr, *The Clearing and Collection of Checks* (1926) 232-290.

⁶⁶ *Farmers' and Merchants' Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649, at 667 (1923).

⁶⁷ The opinion of counsel, cited in n. 61, *supra*, suggests, *inter alia*, the imposition of a prohibitive tax on checks drawn on or payable at state banks. *Veazie Bank v. Fenno* [8 Wall. (75 U.S.) 533 (1869)] would hardly justify such a measure. Issuance of currency is inherent to sovereignty but the deposit and "check" business is essentially private in character. So, too, the opinion fails to mention *Farmers' and Merchants' Bank of Monroe v. Federal Reserve Bank of Richmond*, *supra*, n. 65 and 66.

Veazie Bank v. Fenno. It has appeared also in the *Gold Clause Cases*, at a time when such cases were islands of victory in a flood of judicial defeats for the government. Certainly bank deposits do not involve matters purely monetary (nor did the *Gold Clause Cases*). However, in the banking field, too, the trend toward nationalization is so powerful that it is bound to have its repercussions upon legal thought.⁸⁸

⁸⁸ See also "Constitutionality of exclusive Federal control over commercial banking", Note (1934) 43, Yale L.J. 454.

CHAPTER IV

DEBTS IN GENERAL

SECTION 19

CHARACTERISTICS OF DEBT

I. *The Object of Debt*

The term "debt" is used here in a broad sense,¹ to include pecuniary obligations of any kind, contractual as well as non-contractual, calling for payment both of liquidated and unliquidated amounts. What is owed must be a "sum" of representatives of a given "ideal unit". The "debtor" has a choice whether and what kind of coins or paper money shall be used in making the payment.² One speaks of a "sum" rather than of "quantities" of money, since the number of coins or notes is irrelevant. Even in minor payments the number of possible combinations may be formidable. Legislation supplies the debtor with the rules of this "combination game" by establishing the arithmetical ratios of the several money types to the ideal unit, and by regulating their legal tender quality. In this sense, at least, the Supreme Court of the United States is correct in asserting that pecuniary contracts "deal with a subject-matter which lies within the control of the Congress" and have, since such legislation frequently varies, "a congenital infirmity".³ However, while monetary matters are

¹ On the manifold meanings of the word, see 17 *Corpus Juris* (1919), sub titulo "debt" sec. 1.

² On the error in the language of *Knox v. Lee*, 12 Wall. (79 U.S.) 457 at 552 (1871), *supra*, p. 179, n. 42.

³ *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 at 308 (1935). See Mr. Justice Strong in *Knox v. Lee*, *supra*, at 549 "Contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment". The same idea appears in a like judgment of the Supreme Court of the Republic of Colombia, Feb. 25, 1937, 44 *Gaceta Judicial* 613.

subject to federal legislation, the rules of contract are subject to state legislation. The political nature of currency regulation is illustrated by the Austrian Civil Code which, with a few exceptions, omitted the rules on monetary rights and obligations, leaving their regulation to separate currency enactments.⁴

Governmental interference and the "combination-game" feature are, then, characteristic of debts. They are absent in the case of other obligations, even those involving delivery of fungible goods. The structure of other obligations is ordinarily much less complex than that of debts which are seemingly simple, but in fact exhibit very peculiar, if not anomalous features when subjected to legal analysis.

During the middle ages and later centuries monetary questions of a legal nature were treated mainly in connection with the subject of *mutuum* (loan).⁵ The first general legal theory of debts was apparently that presented by Friedrich Carl von Savigny in the first volume of his "*Obligationenrecht*" (1851).⁶ Since then, this subject-matter has been systematically considered, principally by German writers.⁷

Savigny's discourse has profoundly influenced later writers, but is far from being satisfactory. He relies strongly on an essay of the economist Hoffmann⁸ in which he found the

⁴ See Hans Charmatz, "*Die Geschichte der geldrechtlichen Bestimmungen des österreichischen Privatrechts*", in *Festgabe für Oscar Engländer* (Prague, 1937) 75.

⁵ A discussion of the monetary doctrines of earlier periods may be found in Gustav Hartmann, *Ueber den rechtlichen Begriff des Geldes und den Inhalt der Geldschulden* (Basle, 1868); Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre*, vol. 1 (1874), vol. 2 (1883); Taeuber, *Molineaux' Geldschuldlehre* (1928) and, very instructive, Taeuber, *Geld und Kredit im Mittelalter* (1933).

⁶ See also Archibald Brown, *An Epitome and Analysis of Savigny's Treatise on Obligations in Roman Law* (1872) 71.

⁷ See Hartmann, *op. cit.*; M. Wolff, "*Das Geld*" in 4 *Ehrenberg's Handbuch des Handelsrechts* (1917) 563; 1 von Tuhr, *Allgemeiner Teil des Schweizerischen Obligationenrechts* (1924) 51; F. Eckstein, *Geldschuld und Geldwert* (1932); Thormann, "*Die Geldschuld im schweizerischen Privatrecht*", *Zeitschrift für Schweizerisches Recht*, 1937, 10; more from an economic angle: Landesberger, *Währungssystem und Relation* (Vienna, 1891) 151, a forgotten though valuable monograph; Helfferich, *Money* (tr. by Infield, 1927); Knies, *Das Geld* (2d ed., 1885) 406. Pertinent writings in non-German languages are Planiol-Ripert, *Traité Pratique de Droit Civil Français* (1930) no. 1149 et seq. ("*paiement*"); Scaduto, *I Debiti Pecuniari e il Deprezzamento Monetario* (1924); Ascarelli, *La Moneta* (1928) 276; L. S. Seral, "*El Problema de las Deudas de Dinero*", in *Universidad* 1926, 3. For special literature on depreciation problems, see *infra*, sec. 22, n. 1.

⁸ J. G. Hoffmann, *Die Lehre von Geld* (1838), repeatedly cited by Savigny.

commonplace that the central characteristic of money is to be exchanged for goods and services. This "general financial power" (*allgemeine Vermögensmacht*) is, in Savigny's doctrine, what the debtor has to procure for his creditor. But general financial power is merely a description of the economic potentiality of money. It is neither a juridical concept, nor suitable for a legal definition of debts.⁹

II. Debt a "Personal" Obligation

Rejecting the idea that a vague "power" is the subject of debts, and making the assumption that the obligation of the debtor is the delivery of tangibles, i.e., of coins or paper money, it must nevertheless be admitted that there is a peculiar indefiniteness inherent in the concept of money. Leaving aside payment by check and other money substitutes acceptance of which is at the payee's option, the characteristics of specific money to be used in payment are undetermined at the time of the creation of the debt, except as to their basic unit, and as to their sum in terms of this unit. At the moment of contracting, the parties can not foresee the money types that will be available at the time of payment, since, as we know, the constituents of the system are subject to all kinds of alteration. "Debt" therefore is the very contrary of a contract which creates rights in relation to specific property ("real" contract). In early English law, the notion of debt involved "a sum of money belonging to one person [the creditor] but in the possession of another [the debtor],"¹⁰ a conception analogous to that still popular in connection with money deposited in a bank.¹¹ Yet this primitive notion,

⁹ Savigny was, apparently, aware of this defect and therefore tried to impress a juridical character upon his "*allgemeine Vermögensmacht*". He defined *Vermögen* as the whole of an individual's property rights, a legal concept. However, in the expression "*Vermögensmacht*" there is a shift in the meaning of the root "*Vermögen*" from the legal to the economic sphere. In fact, *allgemeine Vermögensmacht* is nothing but what is ordinarily called "purchasing power". The source of Savigny's confusion lies in his misinterpretation of the measurement function of money which he took to be the function of "representing" the components of "*Vermögen*" in its legal sense.

A corollary of Savigny's doctrine is his "current-value" theory. See *infra*, p. 297.

¹⁰ 2 Pollock and Maitland, *The History of English Law* (2d ed., 1899) 205; Langdell, *Summary of Contracts* (1880), sec. 100. See also Ames, "Parol contracts prior to assumpsit", (1894) 8 *Harv. L.R.* 252.

¹¹ 1 Pollock and Maitland, *ibid.*; Williston, *Contracts* (Rev. ed., 1936), sec. 11.

explainable perhaps by the scarcity and low velocity of coin at that time, is entirely absent in the modern idea of debt; it seems to have been imperceptible in the Roman law,¹² with its amazing anticipation of modern capitalistic legal mechanism. At the present time it is a universal rule, as it was in Roman law, that a pecuniary obligation constitutes a right *in personam*. The creditor and the law rely entirely on the debtor's means or his abilities to procure the money necessary for the discharge of the debt at the time of its maturity. In ancient Roman law this meant pledging his person, with the possible effect of being arrested, through "*manus injectio*" and of being sold eventually into slavery, by the creditor.¹³ Sale of the debtor's belongings was apparently included in the proceedings.¹⁴ Bodily liability of the debtor, in its tempered form of imprisonment for debts, persisted up to the nineteenth century, but was then for the most part abolished.¹⁵ Since that time only liability of the debtor's property, namely, of everything belonging to him, remains. This is the core of "personal" liability. As a matter of fact, protection of the holder of a debt has been considerably lessened in effectiveness. In case of the debtor's bankruptcy, the creditor is in the unfortunate position of having to depend on the bankruptcy dividend; in a characteristic English term, he is a "general" creditor, the great bulk of creditors falling within

¹² Rabel, "*Grundzüge des Römischen Privatrechts*", 1 Kohler and Holtzendorff's *Encyclopädie der Rechtswissenschaft* (7th ed., 1915) 459 [suggesting, however, that there might be a connection between the Roman *actio certae pecuniae* and the conception of a tort committed by the person doing the wrongful retaining].

¹³ See, e.g., Girard, *Manuel Élémentaire de Droit Romain* (8th ed. by Senn, 1929) 1108, 1041; Buckland, *A Textbook of Roman Law* (2d ed., 1932) 618. The *manus injectio* presupposes a pecuniary obligation, Girard, *op. cit.*, 1050. The twelve Tables (III 6) even confer the right upon the creditors after the lapse of three weeks, to dismember the debtor ("*Tertius nundinis partis secanto. Si plus minusve secuerunt, se fraude esto*"). This cruel old notion is to be found in other primitive laws and might have influenced Shakespeare's perception of Shylock. Kohler, *Shakespeare vor dem Forum der Jurisprudenz* (1884) 30. The pledging of his body by the debtor was well known to Germanic law, see Hübner, *History of Germanic Private Law* (tr. by Philbrick, 1918) 476.

¹⁴ See Joers-Kunkel-Wenger, *Römisches Privatrecht* (1935) 379.

¹⁵ Hanna, *Creditors' Rights* (2d ed., 1935) 26; as to French law, see 2 Planiol, *Traité Élémentaire de Droit Civil*, (11th ed., 1935), no. 175 *et seq.*; for the German law, the Act of the North German Confederation (*Norddeutscher Bund*) abrogating the imprisonment for debts of May 29, 1868, *Bundesgesetzblatt* 1868, 237, taken over by the German Reich at its foundation in 1871.

this category. Nor can there be, in Anglo-American law, any "specific performance" of a debt with its menace of imprisonment.¹⁶ The great number of trust beneficiaries, express and constructive, who may have priority over the "general" creditors are further instrumental in rendering the latter's situation precarious.¹⁷

The category of "personal" creditors is not confined to money creditors. It also includes, for instance, a purchaser who under an agreement to sell is entitled to the delivery of a *res*, title to which has not yet passed. Generally a claimant (not in "*rem*") to goods or to services is considered a personal creditor.

On the other hand, however, specific money can be the subject of "real" or kindred rights and actions. Specific money may be followed, in Anglo-American law, by replevin,¹⁸ and in civil law by the property action (*rei vindicatio*) or by possessory remedies. However, as indicated,¹⁹ cases which shift the creditor into the privileged class, rarely occur under modern conditions; occasional efforts of money creditors by artifice to resort to privileged forms of action have been rejected by the Courts.²⁰ Still, in Anglo-American law, a right of action for the payment of money may be in the nature of a trust or an equitable lien.²¹

The English language has only one expression, namely, "debt", to signify the "creditor" and the "debtor" side of the monetary obligation—the "*créance*" (*Forderung*) and the "*dette*" (*Schuld*) [The creditor has the "*créance*", the debtor has the "*dette*"]. This gap in English terminology is noteworthy, since English is the language of the most financially advanced countries, and generally possesses an incomparably rich vocabulary.

¹⁶ Pomeroy, *Specific Performance of Contracts* (3rd ed., 1926), sec. 48.

¹⁷ See *infra*, p. 232, n. 56.

¹⁸ *Sager v. Blain*, 44 N. Y. 445 (1871). See *supra*, p. 60, n. 33.

¹⁹ *Supra*, p. 59.

²⁰ *Sager v. Blain*, 44 N. Y. 445 (1871); *Hazelton v. Locke*, 104 Me. 164, 71 Atl. 661 (1908).

²¹ *Supra*, p. 56.

III. Obligations Purporting Delivery of Fungible Things

The logical connection of the money concept with the notion of fungible things, manifests itself historically in the chapter on debts, through remarkable economic and legislative facts. In antiquity, even after the use of money had become common, loans were often made in fungible things other than money.²² This appears particularly from the Egyptian papyri which show that loans of wheat were frequent;²³ and even in Justinian's *Corpus Juris*, where money appears as the almost exclusive subject of loans, the Code refers occasionally to loans made in grain, oil, or wine. Indeed, the Roman doctrine of loan, formed several centuries before the promulgation of the *Corpus Juris*, associated money and other fungible things as the possible objects of a loan (*mutuum*).²⁴ This association was extended by the Romans to other credit transactions,²⁵ but the basic diversity of money loans and other loans appeared early in antiquity.²⁶ Treating both types alike is inappropriate indeed in a developed monetary economy in which "loans" of commodities are extremely rare phenomena and perform functions entirely different from typical money loans. It is indicative of the potency of Roman legal tradition that the ancient doctrine has been taken over by all of the modern Civil Codes.²⁷ The majority of them have substituted "consumability" for fungibility, "consumable" things being

²² Egon Weiss' article on "Kredit" in 11 Pauly-Wissowa, *Realencyclopädie der Classischen Altertumswissenschaft*, (1922) 1694 is particularly informative.

²³ Berger, *Die Strafklauseln in den Papyrusurkunden* (1911) 103; Mickwitz, *Geld und Wirtschaft im Römischen Reich des Vierten Jahrhunderts* (1932) 127, 207. An example of a loan of wheat, made in the first century B. C., is found in 1 Hunt and Edgar, *Select Papyri* (1932), "Agreements" No. 68. On loans of grain in ancient Babylon (about 2000 B. C.), see Taeuber, *Geld und Kredit in Mittelalter* (1933) 40.

²⁴ See Gaius in *Dig.* 44, 12, 1, 2: "*Mutui datio consistit in his rebus quae pondere numero mensura constant veluti vino oleo fromento pecunia numerata . . .*"

²⁵ Namely to the "constitutum", *Cod.* 4, 18, 2. See Buckland, *A Manual of Roman Private Law* (1928) 307.

²⁶ In the case of loans made in fungible goods the crucial point was to ascertain, by contractual provision or otherwise, the sum to be paid by the debtor in case of his default. Nor is the interest situation comparable. See Berger, *op. cit. supra*, n. 23, at 103; *infra*, p. 233.

²⁷ The old formula still reappears in Cosentini, *Code International des Obligations* (1937) 2173, the most recent legislative draft in the field of the law of contracts.

those the ordinary use of which consists in their consumption. This is true for money, the expending of which is its ordinary use.²⁸ The German Civil Codes, however, have not only restored the pure Roman concept but have pushed the use of the combination, "money" and "other fungible things", to its extreme. In addition to loans and "irregular deposits" (involving a transfer of ownership to the "depository") which may be made in any kind of fungible things,²⁹ the same juxtaposition of money and fungible things is found in the statutory requirements for certain quasi-negotiable instruments,³⁰ and for summary judicial proceedings.³¹ However, few cases have given occasion for an application of the rules mentioned to non-monetary objects, and only to fungible securities such as bonds or stocks,³² and these few cases have only revealed the substantial diversity between the non-monetary and the

²⁸ The French Civil Code defines the "*prêt de consommation, ou simple prêt*", viz., the ordinary loan, in terms of a definite quantity of things "*qui se consomment par l'usage*", art. 1892, 1874, and this theory which also appears in the Austrian Civil Code 983 has passed into the Codes which rest on the French Code, such as the Italian Civil Code 1819. The variance in the definition is hardly of any noticeable practical significance.

²⁹ German Civil Code 607 (loan), 704 (irregular deposit). Section 704 does not specifically mention the money. On the Roman origin of the irregular deposit, see Girard, *Manuel Élémentaire de Droit Romain* (8th ed., 1929) 564.

³⁰ German Civil Code 783 (*Anweisung*); Commercial Code 363 (*kaufmännische Anweisungen* and *kaufmännische Verpflichtungsscheine*).

³¹ German Code of Civil Procedure 592, 688, 794 No. 5.

³² Of course there is no real loan of securities where the borrower has to restore in money the value of the securities received. French *Cour de Cassation*, March 19, 1928, *D.H.* 1928, 303; *Reichsgericht*, Jan. 7, 1881, *R.G.Z.* 3, 324. So-called "loans" of securities sometimes make their appearance in complicated corporate stock transactions aimed at tax advantages and other objectives not usually associated with loans. For examples, see Nussbaum, "Acquisition by a corporation of its own stock", (1935) 35 *Columbia L.R.* 971 at 990, n. 89, and *Pierre S. du Pont v. Commissioner*, Board of Tax Appeal June 30, 1938 (1938), *Commerce Clearing House, Board of Tax Appeal Service* 26,637. See, furthermore, e.g., *Reichsoberhandelsgericht*, May 19, 1876, 20 *Entscheidungen des Reichsoberhandelsgerichts* 303 where there was actually a purchase of stock under the purchaser's obligation to restore new stock in case of another authorization of stock. In *Reichsoberhandelsgericht*, Dec. 29, 1872, 7 *ibid.* 344, the form of lending bonds apparently was chosen in order to disguise the real rate of interest, which was to consist of the ostensible interest and of an obligation of the borrower to restore the interest coupons which matured within the loan period. As to the former German *Pfandbriefdarlehen* (mortgage-bond loans), see Nussbaum, *Deutsches Hypothekenwesen* (2d ed., 1921) 233.

monetary situations.³³ The anachronism has merely resulted in complicating and obscuring the law.³⁴

The common law was much more fortunate in that there was no reception of Roman doctrine. The fungibility concept has been introduced only recently into American law,³⁵ but has not been coordinated with the money concept.³⁶ It is not used by English courts, and only slight attention has been paid to the concept in Anglo-American legal science.³⁷

SECTION 20

RULES OF DEBTS

I. *The Rule of Indestructibility*

Obligations may be terminated by a subsequent impossibility of performance. While this proposition has in civil law

³³ A "loan" of used tires to be restored in new tires is referred to in *Reichsgericht*, Oct. 9, 1922, *Deutsche Juristenzeitung*, 1923, 112 but the transaction should be classified as a barter. Practically the problem of classification was irrelevant.

³⁴ Under sec. 607 of the German Civil Code, the borrower is obligated to return to the lender, "things of the same kind, quality and quantity", as received. While "quality" obviously bears upon loans of fungible goods, the *Reichsgericht* in its great revaluation judgment of November 28, 1923, *R.G.Z.* 107, 78, refers to the instance of a case where the borrower has to supply money of the same value. "Quality", however, is not value, and if money has depreciated, money of the former value no longer exists. Moreover, the argument proves too much, since under the revaluation theory the lender is not entitled to the full value of his original performance, but only to an equitable compensation. The argument soon disappeared from the numberless revaluation cases. 2 Staudinger *Kommentar zum Bürgerlichen Gesetzbuch* (9th ed., 1930) 76.

³⁵ In this connection, see *Kimberly v. Patchin*, 19 N.Y. 330 (1859), where despite the absence of the term "fungible" from the opinion, the influence of Roman law is apparent from the examination of the rule that title can pass to unascertained goods of a class typified by such commodities as "wine, oil, wheat, and the other cereal grains and the flour manufactured from them . . ."; wine, oil, and wheat being—in the same sequence—the instances given in the Roman sources *supra*, p. 217, n. 24. The rule was adopted and the term "fungible" first employed by Williston in 1902 in drafting the Uniform Sales Act 76; which term and definition were at a later date incorporated into the Uniform Warehouse Receipts Act, sec. 58. See also Restatement, *Restitution* (1937), sec. 66(e) and *supra*, p. 4.

³⁶ It may be mentioned, however, that under the Georgia Code (1933), sec. 14-201(2), a promissory note may be made payable in cotton or other articles of value.

³⁷ For discussions of this topic, see Holland, *Jurisprudence* (9th ed., 1900) 99, 275; 2 Austin, *Jurisprudence* (5th ed., 1911) 778-80; Terry, *First Principles of Law* (3d ed., 1894) secs. 250, 648, 821; Kocourek, *Jural Relations* (1927) 313-14, 322.

a much wider application than it has in Anglo-American law,¹ the latter sometimes effects a release of the debtor on the theory that under the circumstances of the case the promise given was constructively conditioned upon continued possibility of performance.² However, neither rule is applicable where a money debtor, even by the most deplorable accident becomes financially unable to pay his debts.³ Inability of this sort would not constitute a defense even in equity.⁴ In present days this state of the law may turn out disastrous, *e.g.*, to those emigrés who were more or less deprived of their resources by the governments of their countries of origin.⁵

Generally speaking, where fungible things are owed, impossibility would only exist when the whole *genus* of the goods owed has become unobtainable. This situation, however, can never develop in respect to money, for even after the termination of a monetary system, other money will evolve to be used in payment of pre-existent debts under "recasting" rules governing the transition from the old into the new monetary conditions.⁶ Similarly, where foreign money is owed, and is not obtainable because of exchange control, payment in national money has to be made in lieu of the foreign money contracted for.⁷ We are therefore faced, in a certain sense, with an indestructibility of monetary obligations, and this

¹ "Impossibilium nulla obligatio". For the French Law, see 2 Planiol, *Traité Élémentaire de Droit Civil* (11th ed., 1935), no. 620 *et seq.*; for the German law, see 2 Staudinger, *op. cit. supra*, n. 34, p. 248, and comment at secs. 275, 279.

² Anson, *Principles of the Law of Contract* (5th Am. ed. by Corbin, 1930) 468, n. 2.

³ That impossibility of payment does not constitute a good defense was recognized as early as the time of the noted Italian commercialist Scaccia "De Commercis et cambio", sec. 2 glossa 3, sec. 115 (1619). The rule was applied by the *Reichsgericht*, March 1, 1882, *R.G.Z.* 6, 125; Appellate Court of Hamburg, March 31, 1922, *Hanseatische Gerichtszeitung* 1922, 183; Austrian Supreme Court, June 28, 1921, 4 *Die Rechtsprechung* 73; Polish Supreme Court, February 21, 1922, 1 *Oreznictwo* 294, referred to in 4 *Die Rechtsprechung* 226; *Central Hanover Bank & Trust Co. v. Siemens und Halske A. G.*, 15 Fed. Supp. 927 (D.C.S.D.N.Y., 1936), *aff'd* 84 F.(2d) 993 (C.C.A. 2d, 1936), cert. den., 299 U.S. 585 (1936), referring to 6 Williston, *Contracts*, sec. 1972. The latter case bears upon the international effects of German exchange control, *infra*, sec. 38 II.

⁴ *Hopper v. Hopper*, 16 N.J. Eq. 147 (1863) [envisaging defenses to a decree for specific performance, against the vendee, of a contract for the purchase and sale of real estate].

⁵ See, however, as to mark debts of German and other emigrés, *infra*, sec. 38, n. 42.

⁶ This will be discussed under II.

⁷ *Infra*, sec. 37 II.

characteristic of debts is perhaps still more striking if associated with the civil law principle under which the debt of a deceased debtor automatically passes on to his heir, and upon the latter's death, to the next heir and so on *ad infinitum*.

II. Abolition of the Currency Contracted For

The rules recasting debts after the abolition of the currency contracted for have to be provided by the legislature which ordained the adoption of the new monetary system.⁸ Such rules may be single or scaled. The scaling device suggests that the former currency has undergone a long-time depreciation, and constitutes the main type of revaluation.⁹ In the absence of a recasting rule, resort may be had to money-exchange regulations for the determination of payments to be made in discharge of old debts.¹⁰ When, however, the United States, in 1792, established the dollar currency, the regulation of transitional conditions was left to the several states.¹¹

The legal difficulties of the recasting rules appear primarily in the international field. The basic problem was discussed at length in the Austrian Coupon Cases.¹² One of the questions in that case was whether the Austrian railroad companies had to pay their thaler bonds in marks after Ger-

⁸ Thus the German Coinage Law (*Münzgesetz*) of July 9, 1873, *R.G.Bl.* 1873, 233, secs. 2 and 3, creating the *mark* on a gold basis, provided in connection with existing debts, couched in terms of thalers (the Prussian silver unit), a recasting ratio of 1 thaler to 3 marks, and in terms of South German (silver) guilders, a ratio of 1 guilder to 1-5/7 mark. When the *reichsmark* was established by the Coinage Law of August 30, 1924, *R.G.Bl.* 1924 II 254, the recasting ratio was determined on the basis of one trillion marks as equal to one *reichsmark*, except for "revaluation" cases. Sec. 5, par. 2 of the law. See *infra*, p. 280, n. 62. The Austrian Law on shilling currency, Dec. 20, 1924, *Bundesgesetzblatt* 1924, No. 461, provided a ratio of 1:10,000 for the transition from the crown to the shilling. On the desirability of having a recasting rule, *cf.* Soetbeer, noted economic expert on money, in "*Die Deutsche Münzverfassung*" (1881) 25.

⁹ *Infra*, sec. 24 I. The Irish currency accommodation act of 1825, 6 Geo. IV, c. 79, constitutes the most elaborate recasting act of a non-scaling type which the writer knows.

¹⁰ Thus in a Moroccan case of April 23, 1923, *J.D.Int.* 1924, 441, the French *Cour de Cassation* simply referred, for the transition of a Moroccan debt into French currency, to the exchange ratio prescribed in 1920 by the French authorities for the exchange of Moroccan currency for French francs. If there is not even an exchange ratio, the market price of the old unit in terms of the new unit as of the time of the transition should be held decisive. See *infra*, n. 24.

¹¹ *Supra*, p. 177.

¹² *Supra*, p. 141.

many had adopted the mark currency on the basis of 3 marks = 1 thaler. The question was answered affirmatively by the German courts,¹³ and the theory underlying that answer was later accepted, in respect to other situations, by the Austrian courts which had rejected the application of the German recasting rule to the thaler-mark problem.¹⁴ As a matter of fact, the state which has created a given currency should in the international field be considered as able to alter this currency as well as to replace it by a new one; and this extends to the recasting rule, provided it is a bona fide rule not purporting to injure foreign creditors.¹⁵

Failure to apply the rule has sometimes been due to a peculiar misunderstanding. European governments in reorganizing their ruined currencies have repeatedly given to the new monetary unit the name of, or a name similar to, the old unit, assigning to it the old parity. This has occasionally brought about confusion in American courts when they had to pass on mark debts after the collapse of the *mark* and the subsequent adoption of the *reichsmark*. They repeatedly took the *reichsmark* for a *mark* holding American mark debtors liable to pay as many reichsmarks as they had to pay marks,¹⁶

¹³ The German cases are listed *supra*, p. 142, n. 26, 27, and among them the judgment of the *Reichsgericht* of Feb. 9, 1887, *R.G.Z.* 19, 47, is the most elaborate and forceful. It applies the German recasting rule independently of the requirement partly set up in the prior cases that there be a German place of payment.

¹⁴ Supreme Court of Austria, May 24, 1927, *Oesterreichisches Zentralblatt* 1927, 777; December 20, 1927, *Juristische Blätter* 1928, 175; Oct. 9, 1930, *Die Rechtsprechung* 1931, 11 at 14. Independently of these cases Austrian writers, too, had approved the theory of the German courts as to the recasting rule. Von Schey, *Obligationsverhältnisse des Oesterreichischen Privatrechts* (1890) 128; 2 Ehrenzweig, *System des Oesterreichischen Allgemeinen Privatrechts* (2d ed., 1928) I 27; Walker, *Internationales Privatrecht* (5th ed., 1934) 471.

¹⁵ The bona fide requirement is stressed by *Reichsgericht*, March 1, 1882, *R.G.Z.* 6, 125 at 133.

A Polish law of Nov. 20, 1919 (German translation in Steiner, *Die Waehrungsgesetzgebung der Successionsstaaten Oesterreich-Ungarns* [1921] 377) recasting debts couched in terms of German marks into Polish marks, which were then at a considerable discount, on the basis 1:1, was held inapplicable by the Appellate Court of Berlin (Kammergericht) because it did not constitute a bona fide recasting rule, Oct. 28, 1922, *J.W.* 1923, 128. See *Reichsgericht*, Jan. 27, 1923, *Warneyers Rechtsprechung* 1923/24, 50 and Dec. 5, 1922, *ibid.* 52 and for particulars, Nussbaum, *Das Geld* (1925) 162, and 3 Neumeyer, *Internationales Verwaltungsrecht*, part 2 (1930) 279.

¹⁶ This happened in *Matter of Martha Lendle*, 250 N.Y. 502, 166 N.E. 182 (1929), *infra*, sec. 22, n. 50, and in a judgment of the D. C. of North. Cal., dated March 1, 1928, reported in *J.W.* 1928, 2884. See Nussbaum, *Bilanz der Aufwertungstheorie* (1929) 29, n. 3. A similar

although, under the recasting rule, a trillion marks were equal to one reichsmark.¹⁷

The problem of the recasting rule becomes more involved when the change of currency is caused by a change of sovereignty. When, through conquest or otherwise, the whole territory is placed under a new sovereign who introduces a new currency, the recasting rule prescribed will apply to all debts which have a primary "contact" with that territory. The legal approach is analogous to the conflict-of-laws doctrine determining the law governing a contract.¹⁸ If the debt appertains to the territory acquired, a bona fide recasting rule of the new sovereign should be accepted by foreign courts.¹⁹ The same view also holds good in the more frequent case in which only part of the territory where the currency circulates is acquired by the new sovereign. But, in that contingency, the currency contracted for persists within those parts of the territory which were not acquired by the new sovereign, and this fact may be resorted to by foreign courts in order to maintain the original agreement regardless of the recasting rule.²⁰

mistake occurred in *Matter of People (First Russian Insurance Co.)*, 255 N.Y. 428, 175 N.E. 118 (1931), where on a pre-revolutionary life insurance policy new gold roubles were awarded instead of depreciated old roubles. See, however, *Dougherty v. Equitable Life Assn. Co.*, 266 N.Y. 71, 193 N.E. 897 (1934). Another instance of similarity between the names of the old and the new unit is furnished by the Danish law of 1813 replacing the *Riksdaler* by the *Riksdaler Courant*, *infra*, sec. 24, n. 7.

¹⁷ German Coinage Law of August 30, 1924, *R.G.BI.* 1924 II 254, sec. 5, par. 2.

¹⁸ See, e.g., Dicey, *Conflicts of Laws* (5th ed., by Keith, 1932) 669, sub-rule 2.

¹⁹ In the former German territory of Tanganyika the English replaced the local rupee with a local shilling, and rupee debts were recast accordingly. The *Reichsgericht*, however, refused to apply the recasting rule to contracts between German nationals, irrespective of the strong Tanganyika contacts of the debts in question. *Reichsgericht*, June 3, 1924, *R.G.Z.* 108, 298; Sept. 19, 1923, *R.G.Z.* 107, 121. See also the following decisions of the Mixed Arbitral Tribunals, instituted by the Treaty of Versailles: Feb. 13, 1925, 5 *Recueil des Décisions* 551 at 577 (German-Czechoslovakian M.A.T.); July 15, 1926, 7 *ibid.* 14 (German-Greek M.A.T.); May 27, 1927, 7 *ibid.* 604 (Franco-German M.A.T.). The question is discussed by Neumeyer, *op. cit. supra*, n. 15, at 274 n. 44.

²⁰ In former German South-West Africa, now under mandate of the South African Union, the German mark currency was in force; mark debts were recast in terms of pounds, after the territory had been mandated to the South African Union. As in the cases cited in the preceding note, the *Reichsgericht* rejected application of the recasting rule to South-West-African mark contracts between German nationals, granting "revaluation" (*infra* sec. 23) instead. *Reichsgericht*,

There are instances in history, however, where the new sovereign has, by design, left the country without any rule for the settlement of debts entered into in the former currency. This occurred in 1806 when Bavaria conquered Tyrol, then on the Austrian paper currency, and introduced the Bavarian silver guilder. The Bavarian government refused to formulate any recasting provision in respect to debts incurred in Austrian money, but boldly announced²¹ that "common law"²² included sufficient rules quite clear to a trained and thorough lawyer; a proposition so far from the truth that the controversy continued for many decades.²³ Yet there has been no judicial holding on this question. A possible solution would have been to treat the debts as calling for payment in Austrian currency, as before, thus making them debts couched in terms of a foreign currency, from the Bavarian viewpoint.²⁴

Nov. 28, 1923, *R.G.Z.* 107, 78; Dec. 8, 1930, *R.G.Z.* 131 at 41, 49. The Polish recasting rule for marks was applied between Polish citizens in *Reichsgericht*, Jan. 27, 1923, *Warneyers Rechtsprechung* 1923/24, 50.

The German recasting rule for the Sudeten territory is found in the decree of October 15, 1938 *Reichsgesetzblatt* 1938 I 1430, the ratio being in favor of the Czechocrown, similarly as in the case of Austria, *infra*, n. 24.

²¹ Hufeland, *Ueber die rechtliche Natur der Geldschulden* (written in 1807, published at Savigny's instigation in 1851, see *infra*, n. 23) 8.

²² Namely, the Roman law as "received" and developed in Germany.

²³ The case is remarkable in that it gave rise to considerable comment. Hufeland, *op. cit.*, discussing the Tyrolean events, suggested that a silver value be conferred upon the old debts, to be ascertained on the basis of the discount which the Austrian paper guilder had, at the time of contracting, in terms of the silver guilder. This became one of the sources of Savigny's current-value doctrine, *infra*, Excursus following sec. 25, at n. 6.

²⁴ Professor Henry Ussing, Copenhagen (*Ugeskrift for Retsvaesen* 1926 B 199), in a detailed review of the author's book *Das Geld* (1925), refers to the fact that Denmark, in the law of June 28, 1920, no. 292, *Love og Anordninger*, 1920 A 868, refrained from enacting a recasting rule for mark debts when it introduced Danish currency into the territory ceded to it in 1920 by Germany. Professor Ussing, approving of the writer's theory, suggests treating the mark debts in question as foreign-currency debts.

If the entire territory from which the currency involved originated has been acquired by the new Sovereign, application of the rule suggested above n. 10 would seem preferable in case the new Sovereign has not provided for a recasting rule. Formerly the question had been much discussed in German literature. See, e.g., Hartmann, *Ueber den rechtlichen Begriff des Geldes und den Inhalt der Geldschulden* (1868), and Knies *Das Geld* (2d ed., 1885) 425. When in March, 1938, Germany incorporated Austria into her territory, one and a half Austrian shillings were equated to one reichsmark. Decree of March 17, 1938, *E.G.Bl.* 1938 I 253; Decree of May 25, 1938, *ibid.*, 1938 I 601 and Executive Ordinance of April 23, 1938, *ibid.*, 1938 I 405. That ratio, applicable

Still another problem is presented where new currencies come into existence by disintegration.²⁵ Here a recasting rule will be implied to the effect that in debts, one unit of the new currency will be equal to one unit of the former currency. Thus when the Austrian currency disintegrated in 1919, a debt of one (Imperial) Austrian crown became a debt of one Czechoslovakian or Hungarian, or (republican) Austrian crown, depending upon its major local contacts. However, the establishment of clear-cut transitional rules by statute²⁶ or, if obtainable, by treaties among the states concerned²⁷ would seem preferable in such a situation.

III. *The Place of Payment*

The rules regarding manner of payment are, on the whole, merely applications of the principles concerning the discharge of obligations, both monetary and non-monetary. A discussion of those general norms is beyond the scope of the present study. The main peculiarity to be observed in the case of monetary obligations is the law of legal tender.²⁸ Another special problem is the place of tender, or, to use the customary though perhaps less accurate term, the place of payment. Under the Anglo-American rule, the debtor, in the absence of a contractual provision to the contrary, express or implied, has to seek the creditor and make tender to him wherever he is found.²⁹ Payment will frequently be implied as having

to the payment of debts as well as to the exchange of shillings for marks, ostensibly favored wage earners as well as shilling holders and creditors since prior to the events of March, 1938, the market had been much more favorable to the reichsmark (average New York quotations of the reichsmark 40.5; of the shilling, 18.9-19). The reichsmark market, however, due to the extremely elaborate German exchange control, had been to a far greater extent more artificial than the shilling market.

²⁵ *Supra*, p. 151.

²⁶ The Czechoslovakian transitional provisions (law of April 10, 1919), and the analogous Polish ones (law of Nov. 20, 1919), use the place of payment as the criterion. See Steiner, *op. cit.*, *supra*, n. 15, at pp. 226, 377. The same criterion was used by the Italian Court of Cassation, judgments dated April 13, 1921, *Foro delle Nuove Provincie* 1922 I 26 and May 15, 1922, *ibid.*, 1922 I 258.

²⁷ Austria concluded such treaties with Yugoslavia, Italy, Rumania and Czechoslovakia. *Bundesgesetzblatt*, 1924, no. 116; 1924, no. 160; 1925, no. 431; and 1928, no. 277; 1926, no. 92, and additional agreements of a special character.

²⁸ Discussed *supra*, p. 37, in a different relationship.

²⁹ See 6 Williston, *Contracts* (Rev. ed., 1938), sec. 1812; 62 *Corpus Juris* (1933) 667. Regarding the costs of forwarding the money, see *infra*, sec. 33, n. 45.

been contracted for at the place where the creditor resided when the contract was made. This rule, which seems to apply as well to non-monetary obligations, clearly places the duty, cost, and risk of forwarding the money upon the shoulders of the debtor; the debt therefore is "deliverable" [in French "portable", in German a "Bringschuld"] rather than "callable" [in French "querable", in German a "Holschuld"]. This rule has not given rise to much doubt or litigation and is not even touched upon by such writers as Anson and Pollock.

In civil law, however, the situation is different. It is particularly difficult to understand in German law and the related legal systems. The root of the existing intricacies lies in the multiplicity of legal functions tied up with the place of payment. In German law, the place of performance is one of the most important grounds for the determination of venue and jurisdiction in contractual litigation.³⁰ In addition, in the absence of other evidence, the dominant conflict-of-laws doctrine has made the place of performance determinative of the law to be applied to the contract.³¹ These facts alone explain the concern of the Central-European legal systems in the subject matter. But the complexity of the doctrine is due to another factor. As to venue and jurisdiction, there is a tendency in modern civil law, inherited from Roman law, to relieve the debtor, presumably the defendant, of the onerous burden of litigating outside of his domicile; "*actor sequitur forum rei*". This makes the debtor's domicile the ordinary place of his performance, a principle which is in harmony with a time-honored tradition.³² With regard to the cost and risk of payment, however, the Anglo-American rule is obviously sound, especially under modern conditions of communication which make the burden easily bearable by the debtor. The Central European Codes therefore distinguish between the place of performance ("*Erfüllungsort*") or more specifically

³⁰ German Code of Civil Procedure 32; Austrian Judiciary Code ("*Jurisdiktionsnorm*") 88.

³¹ See Nussbaum, *Deutsches Internationales Privatrecht* (1932) 217 with references to German and Swiss law. See also *infra*, p. 229, n. 42. The expansion of the place-of-payment doctrine is partly due to Savigny. See Gutzwiller, *Der Einfluss Savigny's auf die Entwicklung des Internationalen Privatrechts* (1923) 92.

³² Casselli, tit. "*Pagamento*" in 18 "*Digesto Italiano*" (1906-1910) 27 and 59 traces it back to Molinaeus, the famous French jurist (1500-1566). The ancient Roman law was very ill-defined as to this point, Casselli at 23.

place of payment ("Zahlungsort") which in case of doubt is the place of the debtor's domicile,³³ and the "place of destination" ("Bestimmungsort") which ordinarily is the place of the creditor's domicile. Normally the debtor has to "pay" at his own domicile with the concomitant obligation of sending the money at his cost and risk to the creditor's domicile.³⁴ By this artificial device the law favors the debtor with regard to jurisdictional and conflict-of-laws requirements, but favors the creditor with regard to the risks of payment. The price paid for this solution, which to a certain extent may be explained historically,³⁵ is a complete distortion of the place-of-payment conception, nothing actually being "paid" at that place since the actual payment is made at the place of "destination". This has led to considerable confusion.³⁶ It would have been more desirable to select the creditor's domicile as the regular place of payment³⁷ and at the same time to change the procedural rule so that the place of payment should not be determinative of venue and jurisdiction.

While the Latin legal systems, by contrast with the Central European, have refrained from overemphasizing the place-

³³ German Civil Code 269; Austrian Civil Code 905. Express or implied provisions of the contract are given precedence over the Code rule, as correctly stated in *Pan-American Securities Corp. v. Friedrich Krupp A. G.*, 6 N.Y.S. (2d) 993 (1938). Moreover there are statutory qualifications of the rule which, however, are immaterial for the purpose of the present discussion. Swiss law is different, see *infra*, n. 37.

³⁴ This is true even if the creditor resides abroad, *Kammergericht* (Appellate Court of Berlin), June 6, 1918, 74 *Seufferts Archiv* 1.

³⁵ The rule was an outgrowth of the Uniform German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*) of 1861 (Art. 325), the draftsmen of which had no authority over procedural law. They were compelled indeed, to leave the "place of performance" at the domicile of the debtor, lest undesirable results appear in the field of jurisdiction. See Nussbaum, *Das Geld* (1925) 74.

³⁶ As to Conflict-of-laws, see the cases cited in Nussbaum, *Deutsches Internationales Privatrecht* (1932) 219, n. 4. In order to avoid inconvenient results, courts have frequently read into contractual clauses which established a definite *Zahlungsort*, an agreement that in fact only a *Bestimmungsort* was meant by the clause. *Reichsgericht*, Dec. 7, 1921, *R.G.Z.* 103, 259; Austrian Supreme Court May 24, 1924, *Zentralblatt für die Juristische Praxis*, 1924, 497; Appellate Court of Dresden, March 27, 1907, 63 *Seufferts Archiv* 387. Contrariwise the Supreme Court of Hungary, June 20, 1924, *Zeitschrift für Ostrecht*, 1927, 439, treats the place of destination as the place of performance.

³⁷ This was done by the Swiss Law of Obligations, art. 74, par. 2(1). The Swiss law of civil procedure is substantially cantonal. On Dutch law, see *infra*, n. 39.

of-payment concept,³⁸ they still cling to the traditional rule that the debtor's domicile is in a doubtful case the ordinary place of payment.³⁹ This adherence to tradition, however, has not prevented the French *Cour de Cassation* from imposing upon the debtor the risk involved in sending money to an outside creditor.⁴⁰ Apparently the Court tries to reach the result recognized by Anglo-American and Central European law, but under the Latin rule the application of this theory means punishment of the debtor for doing more than he was obligated to do, and encourages him to wait for the creditor to fetch the money, certainly an undesirable result.

In the post-war period both common law and civil law courts have resorted, in conflict-of-laws situations, and particularly in monetary ones, to the criterion of the place of payment. Especially where the contract provides a definite place of payment that criterion offers a convenient routine way of obtaining the localization desired in deciding a case involving an international or interstate debt. Still, the results reached are frequently, if not in the majority of cases, unsound. As long as money was actually transported for outside payments, the place of payment had a certain significance. But under modern banking this is no longer true. Suppose a London debtor has to pay a New Yorker in dollars. If for one reason or another (probably legalistic)⁴¹ London was stipulated as the place of payment the debtor will send the creditor a check on London or make a remittance on a

³⁸ In French law this place has no jurisdictional relevancy at all and in Italian law (Italian Code of Civil Procedure 91) only to a very limited extent. Nor is there much resort to the place of performance in Latin private international law.

³⁹ French Civil Code 1247 (qualified by art. 1903, 1943); Italian Civil Code 1249 [see 4 Pacifici-Mazzoni, *Istituzioni di Diritto Civile Italiano* (5th ed. by Venzi, 1927-29) 544 and 618]; Spanish Civil Code 1171, par. 3. In determining the debtor's domicile resort must be had to the time of payment rather than of contracting, *Cour de Cassation*, July 9, 1895, *D.P.* 1896 I 349. That the debtor has to bear the cost of payment is set out in French Civil Code 1248; Italian Civil Code 1250; Spanish Civil Code 1168. The Dutch Civil Code 1429, par. 2, although generally derived from the French, has shifted the subsidiary place of performance to the domicile of the creditor.

⁴⁰ *Cour de Cassation*, March 30, 1925, *D.P.* 1927 I 168. Same: Tribunal of the Peace [lowest court] of Beauvais, August 26, 1925, *Gazette du Palais*, 1926 I 335.

⁴¹ For instance, in order to come under Order XI Rule 1(c) of the Rules of the Supreme Court, which give jurisdiction over a breach of contract committed in England, *The Annual Practice* (55th ed., 1937) 86.

London bank unless he simply pays by check on New York, disregarding the letter of the contract. It is, therefore, unwarrantable to refer to the place of payment grave questions that have nothing to do with payment. In doing so we may simplify the argument, but miss the salient point. And this is even more so where the contract is ambiguous as to the place of payment.⁴²

IV. Debt Enforcement and Specific Performance

Monetary obligations are easier to enforce than others. Execution of a judgment decreeing delivery of a specific object is simply accomplished through the sheriff's seizure of it; but the levy can easily be frustrated by removal or concealment of the object. Where a monetary judgment is obtained, however, everything possessed by the debtor may be levied upon; and the proceeds realized by public sale or otherwise are available for the discharge of the debt. The entire proceeding, especially because of its frequency, develops along routine lines, making this sort of compulsory execution superior to others. It is more simple than the various methods used to enforce the commission or omission of an act by putting pressure upon the debtor through threat and punishment. The latter indirect methods of enforcement are on the whole a later development;⁴³ and, in practice, they constitute but a small portion of the total compulsory executions. In Switzerland, only the enforcement of money judgments has been regulated by Federal legislation, all other kinds of compulsory execution having been left to cantonal administration.⁴⁴

⁴² For applications of the place-of-payment doctrine see *supra*, p. 225, n. 26 (recasting rule in the disintegration of a unified monetary system); *infra*, sec. 24, n. 35 (limitation upon revaluation); sec. 30 at n. 6 (manner of payment); sec. 32 I (commodity nature of foreign money); sec. 34, n. 2 (interpretation of ambiguous currency terms); sec. 38 I (range of exchange control); sec. 39, n. 32 (place-of-payment clause in the teeth of a clearing treaty).

⁴³ As to the history of specific performance, see Fry, *Specific Performance* (6th ed., 1921), c. I; Ames, *Lectures on Legal History* (1913), c. XXII. However, common law had early used the proceeding of distress (*distringas*), viz., of attaching the debtor's chattels, perhaps repeatedly, in order indirectly to force him to deliver goods he owed. See, e.g., 3 Blackstone *Comm.* *413; 2 Jacobs *Law Dictionary* (1811) 482. For an early American case illustrating this procedure, see *Molloy's Ex's v. M'Daniel*, 1 Overton (Tenn.) 222 (1806).

⁴⁴ Federal Act regarding enforcement of debts and bankruptcy (*Bundesgesetz ueber Schuldbetreibung und Konkurs*) of April 11, 1889.

The monetary judgment, or in some jurisdictions, its equivalent (*e.g.*, a decree of a non-judicial body, having the statutory force of a judgment) must be couched in terms of a sum certain, in order to enable the sheriff adequately to discharge his duty.⁴⁵ Therefore a complaint calling for the payment of a definite sum owed, lends itself more easily to judicial handling than do those calling for specific performance or for payment of a sum which is to be ascertained by a process of evaluation or through reference to market prices or other outside factors. Therefore, under a system typified by "forms of action" the law will offer a special form for rights of action directed towards the recovery of a sum certain; of which the *condictio (actio) certae pecuniae* in Roman Law⁴⁶ and the *action of debt* in the old common law⁴⁷ are instances. Moreover, under an early English statute⁴⁸ set-off was allowed only for "debts" in actions brought for liquidated amounts. In modern law, the right to receive a sum certain, particularly in connection with bills of exchange and promissory notes, is accompanied by procedural and substantive privileges.⁴⁹ So, too, summary proceedings are sometimes open only to claims for the payment of a sum certain.⁵⁰

The advantages inherent in monetary claims are, in point of legal technique, probably responsible for the well-known phenomenon of compulsory conversion of non-monetary into monetary rights through the medium of a judgment. "*Omnis condemnatio pecuniaria est*". It is surprising that this ancient Roman rule, long abandoned in civil law countries, forms a

⁴⁵ The Italian Code of Civil Procedure 568, clarifying the unsatisfactory wording of the French Code 551, explicitly provides that "compulsory execution cannot take place in respect to an uncertain or non-liquidated debt".

⁴⁶ Girard, *Manuel Élémentaire de Droit Romain* (8th ed. by Senn, 1929) 523.

⁴⁷ See, *e.g.*, Shipman, *Common Law Pleading* (3d ed. by Ballantine, 1923) 132.

⁴⁸ 2 Geo. II, c. 22, sec. 13 (1729). See Lloyd, "The development of Set-off", (1916) 64 *U. of Pa. L.R.* 541.

⁴⁹ Negotiable Instruments Law, art. 1, sec. 1(2); Geneva Uniform Law on Bills of Exchange and Promissory Notes, art. 1, no. 2; in general, see F. Meyer, *Weltwechselrecht* (1909) 100.

⁵⁰ German Code of Civil Procedure 592 [*Urkunden- und Wechselprozess*], sec. 688 [*Mahnverfahren*], 794 (5) [*Vollstreckbare Urkunde*]; Austrian Code of Civil Procedure 548 [*Mandatsverfahren*]. The same was true in New York as to summary judgments until 1933, N. Y. *Rules of Civil Practice* 113. See Clark and Samenow, "The Summary Judgment", (1929) 38 *Yale L.J.* 423.

basic autochthonous principle of Anglo-American law.⁵¹ Equity, under an elaborate system of rules, prescribes the conditions under which the Court will render a non-monetary judgment—specific performance. Normally, however, the non-monetary obligation will be transformed by the judgment into a debt. This is not true of central European countries. The dominant viewpoint in Europe is to the effect that where a right of a non-monetary kind exists, whether it is a right calling for an act or for an omission or for the delivery of a specific object or generally described goods, the court will unconditionally grant judgment in accordance with the claim.⁵²

The French Civil Code seems to come nearer to the Anglo-American system by providing (Art. 1142) that "each obligation to act or not to act, in the case of non-performance, resolves itself into damages". This rule was, however, qualified by broad exceptions in the Code⁵³ and has been rendered even more innocuous by the courts. Carrying on a pre-code tradition they developed a species of injunction (*astreintes*) purporting specifically to enforce the act or omission by threat and infliction of fines.⁵⁴ The Italian Code (Art. 1218) has not taken over the rule of Art. 1142 of the French Code.

The phenomenon of compulsory transformation appears on a larger scale in Civil Law, when the obligor becomes a

⁵¹ It appears particularly on the development of Trover, see Ames, *Lectures on Legal History* (1913), c. VII.

⁵² The German Code of Civil Procedure 883-898 and the Austrian *Executionsordnung* 346-369 offer elaborate systems of rules for enforcing specific performance of non-monetary judgments. The main means applied consists of fines against, and eventually imprisonment of, a reluctant defendant.

⁵³ French Civil Code 1143, 1144. Delivery of a chattel owed is specifically enforced under the Code of Civil Procedure art. 826 *et seq.* See also Amos, "Specific Performance in French Law" (1901) 17 *L.Q. Rev.* 372.

⁵⁴ 7 Planiol and Ripert, *Traité Pratique de Droit Civil Français* (1931) 84. Contrary to the Anglo-American doctrine of "contempt of court" and the German doctrine of compulsory execution by curbing the debtor through threat and punishment, the court cannot resort to imprisonment. And while under the Central European, and, at least sometimes, under the Anglo-American rule the fine has to be paid into the court, it is the plaintiff who gets, as a sort of indemnification, the sum finally to be paid by the defendant under the *astreinte*. Moreover it is in the discretion of the court to resort or not to resort to the *astreinte* (Planiol and Ripert, *op. cit.*, 89), whereas under the Central European system the judgment-creditor is entitled as of right to the compulsory measures provided by the law. To this extent the French system is comparable to Anglo-American Equity, with the difference, however, that in the former the exercise of the discretionary power is not crystallized in a body of definite rules.

bankrupt. Then his obligations to convey movables or immovables, to perform services, etc. become debts in the sense that they have to be satisfied out of the bankrupt's estate through a money payment.⁵⁵ It is remarkable that this policy has a wider application in civil law than in Anglo-American law, the general trend of the former being more favorable to the general creditor.⁵⁶ Furthermore, in civil law countries judgments are often couched in terms of money, not through a compulsory transformation but because plaintiffs ordinarily are able to and prefer to obtain a money-judgment rather than seek a judgment for specific performance.⁵⁷ Nevertheless the actual discrepancy between the two systems is by no means negligible in this respect, the bankruptcy situation being exceptional of course. The Anglo-American rule, while simplifying compulsory execution, results in a tremendous complication of the substantive law, considering the size and growth of the specific-performance doctrine. It may also be advantageous to the plaintiff to obtain an adjudication without becoming involved in the intricacies of the damage computation. However, we shall not dwell on this point. From the angle of monetary doctrine it is sufficient to state that under Anglo-American law each obligation is actually or potentially monetary. The legal bearing of the monetary concept is thus considerably enlarged.

⁵⁵ This is expressly set out in the German Bankruptcy Act (*Konkursordnung*), sec. 69. 2 Jaeger, *Kommentar zur Konkursordnung* (6th ed., 1936) 244 [sec. 69, n. 10] cites a number of non-German bankruptcy acts containing similar provisions.

⁵⁶ The application in bankruptcy of the concepts of trusts and equitable ownership or lien, create priorities in specific property as against the trustee and the creditors; e.g., a vendee under a valid land contract can get specific performance against the trustee. Glenn, *Liquidations* (1935), sec. 532; 1 Remington, *Bankruptcy* (4th ed., 1935), sec. 1414. Similarly in some cases of personal property contracts Glenn, *op. cit.*, sec. 532; *Greif Brothers Coöperage v. Mullinix*, 264 Fed. 391 (C.C.A. 8th, 1920), criticized note (1920) 34 *Harv. L.R.* 309. See also Nussbaum, "Sociological and comparative aspects of the trust", (1938) 38 *Columbia L.R.* 408 at 421.

⁵⁷ There is ordinarily no difficulty for the plaintiff in obtaining damages rather than specific performance. French Civil Code 1146, 1147; German Civil Code 249(2), 250, 251, par. 2, 283, 325, 326; Italian Civil Code 1218.

SECTION 21

INTEREST

I. *Types and Rates of Interest*

Interest is a periodic payment by the debtor to the creditor as compensation for the debtor's use of the credited sum. The civil law systems struggle along with the notion that interest may also consist of periodic supplies of non-mone-
tary fungible goods as compensation for a loan of goods of the same kind.¹ However, this type of transaction is not present in the *Corpus Juris* and in the papyri of Egypt at a time when loans in wheat were in vogue; interest seems to have consisted of a single performance, usually fifty per cent of the amount of the principal, deliverable after the harvest of the crop which resulted from the "borrowed" grain.² The continuance of commodity interest in modern Codes is another, and a particularly flagrant, instance of unwarranted and merely traditionalistic assimilation of fungible commodities to money.

Interest, though ordinarily a matter for stipulation, express or implied, is frequently granted by operation of law. In civil law, such an obligation results from the *mora* [*demeure, Verzug*] of the debtor, which as in Roman law, means delay or omission of performance by the debtor without legal justification.³ In this situation, interest accrues without express or implied agreement of the parties. The rationalization of the rule is that in a modern economy the creditor presumably would have been able to obtain a profit from the principal had it been paid to him on the stipulated date. The common law rule, developed at a less advanced state of national economy, did not allow interest, even for a breach of

¹ This was specifically done by the French Civil Code 1905, the Italian Civil Code 1829, and also by the Austrian Civil Code 984. As to present German law, see 2 Staudinger, *op. cit. supra*, p. 219, n. 34, at p. 106, expressly including, in harmony with the dominant German doctrine, fungible things in the definition of interest.

² E. Weiss, *op. cit. supra*, p. 217, n. 22, at p. 1697.

³ We need not here discuss the details. See 2 Planiol, *Traité Élémentaire de Droit Civil* (11th ed., 1935) 164; 2 Staudinger, *op. cit. supra*, p. 219, n. 34 at 324. As to ancient Roman law, see Girard, *Manuel Élémentaire de Droit Romain* (8th ed. by Senn, 1929) 688; Buckland, *A Textbook on Roman Law* (2d ed., 1932) 550.

contract,⁴ unless it had been agreed to by the debtor. However, in England, the rule had been limited by broad exceptions, practically covering the entire field of business indebtedness, and has finally been replaced by giving the Court discretion to grant or deny interest, and in the former case to determine its rate.⁵ In the United States, interest, by way of damages, is generally allowed for the unlawful detention of money.⁶ To that extent American law is in substantial harmony with civil law.

Legal standards for the rate of interest, indicating "legal interest" (as distinguished from maximum interest)⁷ are ordinarily prescribed by statute, generally ranging from four per cent to eight per cent. Where interest is allowed, these statutory standards are applicable when there is no stipulation relating to interest.⁸ Under modern conditions it would seem desirable to link the legal standard with the official discounting rate of the central-note institute. That has to a certain extent been done under German, Swiss, and Argentine law.⁹

⁴ 1 Sedgwick, *Damages* (9th ed., 1912), secs. 283, 293; 33 *Corpus Juris* (1924) 180.

⁵ *Law Reform (Miscellaneous Provisions) Act, 1934*, 24 & 25 Geo. V, c. 41, sec. 3(1). As to the former law, see Sedgwick, *op. cit.*, 284-291.

⁶ Interest is generally allowed as an element of the total damage for breach of an express contract, 5 Williston, *Contracts* (Rev. ed., 1937), secs. 1410, 1413, and in quasi-contractual actions, 5 Williston, *op. cit.*, sec. 1415. As to the rate of interest, see 5 Williston, *op. cit.*, sec. 1416. In general see 36 *Corpus Juris* (1924) 200 *et seq.*

⁷ Both rates may coincide as they ordinarily do under New York law, *Restatement, Law of Contract, N. Y. annotations* (1933) 334.

⁸ See, e.g., French law of April 7, 1900, *D.P.* 1900 IV 43 (4%, in commercial matters 5%), suspended by law of April 18, 1918, *D.P.* 1918 IV 188 (5%, in commercial matters 6%) and reestablished by decree of Aug. 8, 1935, *D.P.* 1935 IV 225; German Civil Code 246 (4%), German Commercial Code 352 (5%); Italian law of June 22, 1905, *Raccolta Ufficiale* 1905 III 2783 (4%, in commercial matters 5%).

Disparity of legal interest rates between Great Britain and Ireland led repeatedly to problems of conflict-of-laws. *Connor v. Earl of Bellamont*, 2 Atk. 382, 26 Eng. Rep. 631 (Chancery 1742); *Young v. Lord Waterpark*, 13 Sinl. 199, 60 Eng. Rep. 77 (V. Chancellor, 1842); *Denny v. Denny*, 14 L.T.R. 854 (V. Chancellor, 1866); *Bushby v. Camac*, Fed. Cases 2, 226 (C.C.E.D. Pa. 1822). A three-sided conflict-of-laws situation was passed on by the Supreme Court of Poland. Judgment of Nov. 6, 1927, *Zeitschrift für Ostrecht* 1928, 1591 [dollar debt governed by Danzig law; Danzig rules on legal interest held applicable].

⁹ Under German law, two per cent above the discounting rate of the Reichsbank and a minimum of six per cent are allowed to the endorser of a bill of exchange or check, seeking recourse against previous parties. Act of July 3, 1925, *R.G. Bl.* 1925 I 93. Despite the adoption of the Geneva Uniform Bills-of-Exchange Law, the Act is still in force, Act of June 21, 1933, art. 2, *ibid.*, 1933 I 409 and of Aug. 14, 1933, art. 2, *ibid.*, 1933 I 605. The Swiss Law of Obligations 104, par. 3, provides, as between merchants, a rate of "delay interest" equivalent

However, in connection with non-business relationships, an invariable statutory rate might be preferable.

There is still another frequently used rule on interest. Civil law statutes of limitations ordinarily provide short periods for interest claims.¹⁰ The same trend appears in the English law.¹¹

II. Interest or Damages for Delayed Payment

Where interest is granted because of "*mora*" or a breach of contract on the part of the money debtor, Anglo-American¹² as well as Latin law¹³ considers it as the full measure of damages. Further damages for non-payment on the ground of "*mora*" or breach of contract are not permitted. The policy here is to eliminate the troublesome litigation involved in an inquiry as to what the creditor would ordinarily have done with the money. In view of the frequency with which such questions are raised, the juggling of these speculative and arbitrary elements is doubly undesirable. In times of monetary troubles, the rule reveals another important advantage in its exclusion of judicial controversies on depreciation and in indirectly buttressing the official policy which is necessarily aimed at maintaining the legal parity of the monetary unit. Still the rule is not applicable to a number of special (particularly commercial) situations under the Latin Codes, and is unknown to German and Swiss law.¹⁴ In these cases, to the ex-

to the "customary bank discount" in case the latter exceeds 5 per cent. The Argentine Commercial Code 565 applies the banking discount rate to contractual interest not fixed in terms of percentage. The adaptation problem reappears in the field of maximum interest rates, *infra*, p. 248, n. 76.

¹⁰ French Civil Code 2277 (5 years); German Civil Code 197 (4 years); Italian Civil Code 2144 (5 years); Spanish Civil Code 1966 n. 3 (5 years for "periodical performances").

¹¹ 3 and 4 Wm. IV, c. 27, sec. 42 (1833); 37-38 Vict., c. 57, sec. 8 (1874) (mortgage interest, 6 years instead of 12 years).

¹² The lengths to which this rule is carried are well illustrated by *Lodge v. Spooner*, 74 Mass. 166 (1857), where though the contract was to pay dollars in China, extra damages for the higher value of the dollar in China were denied.

¹³ French Civil Code 1153, as amended by Act of April 7, 1900 (*supra*, n. 8); Italian Civil Code 1231; Spanish Civil Code 1108. The Austrian Civil Code 1333 also follows the French rule.

¹⁴ The French Code 1153 exempts the case of the debtor's bad faith as well as commercial and surety matters. The *Cour de Cassation*, Dec. 2, 1925, *Recueil de la Gazette des Tribunaux* 1926 I 36, has even allowed recovery of damages for loss inflicted upon the creditor through

tent that the creditor is not confined to interest he will be allowed the damages actually sustained by him.¹⁵

Where foreign currency is owed, a different attitude should be taken toward the legal rate of interest and the question of greater damages.¹⁶ In fact, the reasonableness of an interest rate depends, to a great extent, upon the conditions of the currency involved. Suppose a mark debt was litigated in a non-German court during the inflation period: it would obviously have been absurd to apply to the debt the local interest rate of perhaps four or five per cent at a time when ten or twenty per cent monthly constituted the common rate of interest for mark loans because of the imminent danger of further depreciation of the mark.¹⁷ Circumstances should, therefore, influence a court's fixing of interest on foreign currency debts.¹⁸ And damages for delayed payment are not necessarily limited to such interest, the policy in favor of the contrary rule being applicable only to debts calling for payments in the national currency.¹⁹

default ["faute"] of the debtor. The Italian law is controversial, see Ascarelli, "*Limiti di applicabilità dell'art. 1231 Cod. Civ.*", *R. D. Comm.* 1930 I 379.

¹⁵ German Civil Code 288, par. 2; Swiss Law of Obligations 106; Austrian Commercial Code [*Allgemeines Deutsches Handelsgesetzbuch*] 283. For the Hungarian law see judgments of the Hungarian Supreme Court cited without date (1922) 3 "*Auslandsrecht*" 311, (1923) 4 "*Auslandsrecht*" 254.

¹⁶ *Contra*: French *Cour de Cassation*, June 19, 1933, *J.D.Int.* 1934, 939, applying the French legal-interest rate to a debt in Swiss francs. The Appellate Court of Rouen, Nov. 26, 1924, *J.D.Int.* 1925, 672, held that interest on pound sterling owed as damages, is to be computed in francs on the equivalent of the sterling amount to be assessed at the date of the damaging event (collision at sea).

¹⁷ *Infra*, p. 247.

¹⁸ The Berlin Chamber of Commerce, a governmental institution, in a "judicial opinion" pointed out that in the case of a debt owed by a German firm to a Belgian firm in terms of Belgian francs, the reasonable rate of "delay interest" for the time following December 1, 1924 would amount to 6 to 8 per cent, the discount rate of the Belgian National bank then being 5½ per cent; in the case of a guilder debt held by a Dutch firm a rate of 6 per cent at the highest was suggested, the Dutch currency being considered more stable. *Mitteilungen der Industrie-und Handelskammer zu Berlin* 1925, 833. Such opinions are rendered upon the request of the courts, and they are almost invariably followed by the latter.

¹⁹ Accord: Appellate Court of Douai, Dec. 15, 1927, *J.D. Int.* 1928, 675 (roubles); Appellate Court of Rouen, March 28, 1933, *Gazette du Palais* 1933 II 27 (pound sterling); Austrian Supreme Court, Nov. 28, 1934, *Die Rechtsprechung* 1934, 228; March 5, 1936, *ibid.*, 1936, 64 (dollar); Supreme Court of Czechoslovakia, May 25, 1934, *Prager Archiv* 1935, 1497 (pound sterling). The Austrian case of 1936 stresses the point that in consideration of the depreciation of the dollar no further

III. *Restrictions on Interest. Usury*²⁰

Restrictions on interest have been known from time immemorial. There is, in the early phases of money economy a natural aversion to interest, a result perhaps of the lack of an organized market for goods and services which in an advanced economy enables the debtor to earn money on the principal. As is well known this aversion was largely responsible for the religious anti-interest dogmas, which in the middle ages were crystallized in a definite canonical prohibition of any interest.²¹ This radical doctrine has been replaced in the European countries by maximum interest laws—a policy well known in ancient law, and particularly in Roman law.²² In a burst of economic liberalism, maximum-interest laws were abrogated by the great majority of the Continental countries during the second part of the nineteenth century, by England

proof of damages is required. Italian law which is, on principle, likewise in accord can more appropriately be discussed in connection with the "local payment" rule of foreign currency debts, *infra*, sec. 33 I.

²⁰ The following discussion is intended as a juridical contribution, limited by the objective and scope of the present volume, to a matter of the most varied economic, legal, philosophical, theological and historical implications. Preponderantly, the learning on the subject is expounded by economists. Recent bibliographies are appended to Salin, art. "Usury" in 15 *Encyclopedia of the Social Sciences* (1935); Peschke, Art. *Wucher* in 8 *Handwörterbuch der Staatswissenschaften* (4th ed., 1928); Hug, *Wucher im Schweizerischen Strafrecht* (Switzerland, 1937). In the legal field the concept of usury has in German literature and legislation been far expanded outside the bounds of monetary transactions. As to this additional and wide province of the doctrine of usury, which cannot be discussed here, see Dawson, "Economic duress and the fair exchange in French and German law (III) Usury", (1937) 12 *Tulane L.R.* 42.

²¹ Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre*, vol. I (1874), vol. 2 (1883); G. O'Brien, *An Essay on Medieval Economic Teaching* (1920) 159; and for brief surveys the articles by Salin and Peschke, *cit. supra*; especially as to English History of Usury Law, 8 Holdsworth, *A History of English Law* (1925) 100, and on German law, Max Neumann, *Geschichte des Wuchers in Deutschland* (1865). Ryan, *Usury and Usury Laws* (1924), frequently cited in American writings, is unscientific and is particularly unsatisfactory in the legal field.

The present writer is indebted to Professor Peake of the Chinese Department of Columbia University for the following information. In Chinese law there seems never to have been a prohibition against taking interest. To be sure, money economy had developed very early in China. A maximum interest of three per cent monthly existed during the two first centuries A.D. and of six in a later period. A more enduring limit was to the effect that the whole of the interest must not exceed the amount of the principal.

²² It appears as early as the Twelve Tables (5th century B.C.); Girard, *op. cit. supra*, n. 3, at 548.

in 1854,²³ by Germany in 1867,²⁴ and by Italy through omission of interest limitations in the Civil Code of 1865.²⁵ France in 1886 abrogated maximum interest laws in commercial matters,²⁶ but not until 1918 was the abrogation made general.²⁷ In some legislation residues of the former system remain, such as provisions to the effect that promises to pay interest above a certain rate must be in writing,²⁸ a rule which also appears in American statutes,²⁹ or that the promisor has a non-barrable right to give notice of termination to his creditor after the expiration of a certain period fixed by the law regardless of the period contracted for.³⁰ In addition, compound interest is practically forbidden.³¹ But these restrictions are comparatively of little importance.

However, the laissez-faire policy in relation to interest did not fare too well and there soon developed a tendency to meet the ensuing abuses with new types of usury laws, not

²³ 17 and 18 Vict., c. 90 (1854).

²⁴ Act of Nov. 14, 1867, *Bundesgesetzblatt* 1867, 159. This enactment of the "North-German Confederation" (*Norddeutscher Bund*) was taken over, in 1871, like the other enactments of the Confederation, by the German Reich.

²⁵ And by the Netherlands, Sweden, Belgium and other countries. R. Schmidt in 8 *Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts* (1906) 171. As to Spain, see *infra*, p. 241, n. 43.

²⁶ Law of Jan. 12, 1886, *D.P.* 1886 IV 32.

²⁷ Law of April 18, 1918, *D.P.* 1918 IV 188. But see *infra*, p. 241. The revolutionary legislation had done away with maximum interest, but the latter was reestablished by a law of Sept. 3, 1807. 16 Duvergier, *Collection des Lois* 176, cf. Capitant, "*La Répression de l'Usure*", *D.H. Chronique* 1935, 61.

²⁸ Italian Civil Code 1831, par. 4, remarkably construed by the Italian Court de Cassation, July 3, 1926, *Corte di Cassazione* 1926, 1362, where the court points out that art. 1831 purports to compel the money-lender "to show who he is and to confront public opinion". Giving a promissory note on a sum including the capitalized interest was held, by the court, not to comply with the rule of art. 1831. Stipulation as to the rate of interest must also be in writing under the French Civil Code 1907, par. 2, a provision interpreted to the same effect as the Italian rule, 11 Planiol-Ripert, *Traité Pratique de Droit Civil Français* (1932) 434.

²⁹ *Infra*, p. 242, n. 47.

³⁰ German Civil Code 247; Italian Civil Code 1832. This rule has been adopted by the French decrees of July 16 and Aug. 28, 1935, *D.P.* 1935 IV 188 and 259. In Massachusetts (*General Laws 1932*, c. 140, sec. 90) the debtor on a loan smaller than \$1000 the interest of which exceeds 18 per cent, has the power to terminate the loan prematurely upon tender of the principal plus interest at 18 per cent for at least 6 months.

³¹ German Civil Code 248; Swiss Law of Obligations 105 par. 3; 314 par. 3. The rule against "anatocisme" (capitalization of interest) was known to Roman law, see Girard, *op. cit. supra*, p. 233, n. 3, at 550; Buckland, *A Textbook of Roman Law* (2d ed., 1932) 465. As to Anglo-American law, see 5 Williston, *Contracts* (Rev. ed., 1937), sec. 1417; Chitty's *Treatise on the Law of Contracts* (19th ed., 1937) 929.

based upon arithmetically fixed rates of interest, but centering in a social-ethical notion of "excessiveness" variously defined by the several legislatures. The English *Money-Lenders' Act, 1900*³² provides for the re-opening of money-lending transactions by the Court in cases where the interest or the amount charged for expenses is "excessive" and "the transaction is harsh and unconscionable or is otherwise such that a court of Equity would give relief"; in such cases the court has power to reform the contract.³³ The *Money-Lenders' Act, 1927*, besides subjecting money-lenders to an expensive license and to elaborate supervision, establishes a presumption of excessiveness in case interest is more than 48 per cent annually.³⁴ Still, the presumption seems not to work very efficiently,³⁵ and neither act applies to persons not making a business of money-lending; bankers and others groups are likewise exempted.

German law affords an example of another type of "anti-excessiveness" act. The prerequisites for usury are much more specific, including besides "flagrant excessiveness"³⁶ the "exploitation of another's penury, lavishness or inexperience"; where such conditions exist, the transaction is entirely void. There is no power of reformation in the court; from the outset the debtor does not have to pay any interest, and it is even controversial whether and to what extent the sum lent is simply forfeited to the borrower.³⁷ In addition, the usurer is

³² 63 and 64 Vict., c. 51 (1900). See the thorough investigation by Orchard, *Money-Lending in Great Britain* (Russell Sage Foundation, Small Loan Series, 1933).

³³ The Indian *Usurious Loans Act* of 1918 (Act X of 1918) is similar. See summary in Ryan, *Usury and Usury Loans* (1924) 219.

³⁴ 17 & 18 Geo. V, c. 21 (1927) as amended by 19 & 20 Geo. V, c. 23, sec. 145(2)(c) (1929).

³⁵ Interest exceeding 48 per cent has been held justified under the circumstances. *Reading Trust, Ltd. v. Spero*, [1930] 1 K.B. 492 (C.A., 1929): 80 per cent allowed; highly speculative and profitable venture; *Parkfield Trust, Ltd. v. Dent*, [1931] 2 K.B. 579 (K.B., 1931): 160 per cent allowed, circumstances not given. On the other hand, see *Verner-Jeffreys v. Pinto*, [1929] 1 Ch. 401 (C.A., 1928): 48 per cent interest in addition to bill of sale for furniture which gave ample security held unconscionable; *Mills' Conduit Investments, Ltd. v. Leslie*, [1932] 1 K.B. 233 (C.A., 1931): Interest exceeded 48 per cent, entry of judgment refused in spite of borrower's consent.

³⁶ A more exact translation would be "receiving financial profits (*Vermögensvorteile*) or promises of financial profits, exceeding the value of the consideration given to such an extent that under the circumstances of the case, the profits are flagrantly disproportionate (*in auffälligem Missverhältnis*) to the consideration . . ."

³⁷ See, e.g., 1 Staudinger's *Kommentar zum Bürgerlichen Gesetzbuch* (9th ed., 1928) 593, where the German extension of the usury

subject to both imprisonment and fine and sometimes to loss of civil rights, an unusual and degrading punishment.³⁸ This whole legislation is fraught with elements of a political and emotional nature, reflecting the violent anti-liberal swing inaugurated by Bismarck at the end of the seventies and distorting the sound core of the new legislative concept, *viz.*, the stress upon penury in the definition of usury.³⁹ Because of its excessiveness, the German legislation has attained only a limited actual significance; the records show comparatively few cases applying the new provisions.⁴⁰ Juridically, Russian law belongs to this group inasmuch as it starts from a broad usury concept emphasizing exploitation of extreme penury; it is characteristic of the Russian legal system that the public prosecutor and other agencies of the government are under a duty to cooperate in, and even to act in bringing about, the disclosure and annulment of the usurious transaction.⁴¹ Exceeding the maximum interest rate is punishable by imprison-

concept to non-monetary transactions is also expounded. See also Dawson, *op. cit. supra*, p. 237, n. 20, at 48. Virtually the same broad conception appears in the Swiss law of Obligations art. 21, but giving the debtor in a usurious loan merely the right to annul the contract within a year's time and to have his performance restored. A Belgian decree of March 18, 1935, likewise practically adopts the German definition, but only as to loans and confines the power of the court to a reduction of the debtor's performances. *Bulletin Usuel des Lois* 1935, 460.

³⁸ German Penal Code 302a-302e. This legislation was inaugurated in 1880, see R. Schmidt, *op. cit. supra*, n. 25, at 181 with ample references to the violent parliamentary debates.

³⁹ The punitive German conception has to a considerable extent been followed by the Italian Penal Code of 1931 art. 644. The latter, however, does not mention "lavishness" and "inexperience"; punishment is also severe, but this is to be expected because of the greater severity in general of Fascist penal law. Even American courts in usury cases tend to stress the significance of the penury element, although there is no legislative basis for this. *People v. Silverberg*, 160 N.Y. Supp. 727 (1915), *aff'd* 171 App. Div. 914, 155 N.Y. Supp. 1132 (1915); *Scheidell v. Llewellyn Realty Co.*, 177 N.Y. Supp. 529 (1918); *Cotton v. Cooper*, 209 S.W. 135 (Tex. Com. App., 1919); *Salvin v. Myles Realty Co.*, 227 N.Y. 51, 124 N.E. 94 (1920); *McWhite v. State*, 143 Tenn. 222, 226 S.W. 542 (1921); *Tenn. Finance Co. v. Thompson*, 278 Fed. 597 (C.C.A. 6th, 1922); *Jenkins v. Moyse*, 254 N.Y. 319, 172 N.E. 521 (1930). See also the N. Y. Penal rule as to "oppressive loans", *infra*, p. 243, n. 55.

⁴⁰ Compare, *e.g.*, the citations in the Commentaries of the Civil Code (Staudinger; *Kommentar der Reichsgerichtsraete*) at sec. 138, par. 2; in the Commentaries of the Penal Code (Ebermayer-Loebe-Rosenberg); in the annual reports of the "*Jahrbuch des Deutschen Rechts*" at sec. 138, par. 2 of the Civil Code. In appraising the number of cases, one has to take into account the wide scope of the German usury conception.

⁴¹ See Schoendorf, "*Neuerungen des Zivilgesetzbuchs Sowjetrusslands*", *Z.A.I.P.* 1928, 68 and 90.

ment or fine. Similarly punishable is the lending of means of production or cattle, at a rate flagrantly over the customary, in exploitation of the need or the embarrassed situation of the borrower, a provision obviously influenced by German law.⁴²

A middle ground has recently been taken by France. The stigma of usury is attached to an interest rate over one and a half times the average interest rate charged by bona fide money-lenders under the same conditions involving the same risk. Charging usurious rates is punishable by fines and in the case of repetition by imprisonment; moreover the debtor may recover the usurious portion of interest.⁴³

IV. American Maximum Interest Acts

The United States and Canada⁴⁴ seem to be the only great countries of western civilization which still cling to the maximum interest principle. Maximum interest statutes prevail in almost all the states.⁴⁵ The maximum interest

⁴² *The Penal Code of the Russian Socialist Federal Soviet Republic*, Text of 1926 with Amendments up to 1932 (London, 1934), art. 173.

⁴³ Decree of August 8, 1935, *D.P.* 1935 IV 225, see Capitaint, *D.H. Chronique* 1935, 61. The Chilean Code of 1857, art. 2206, provides that interest must not exceed one and a half of the normal rate. Spain, which by the Act of March 14, 1856, no. 218, *Collección Legislativa* 1856 I 357, had abrogated the statutory maximum interest rate, prohibited by the law of July 23, 1908, 136 *Boletín de la Revista General de Legislación y Jurisprudencia* 738, the stipulating of interest above the "normal" rate and "obviously disproportionate" according to the circumstances. By a judgment of Jan. 30, 1917, 139 *Jurisprudencia Civil* 201, the Spanish Supreme Court declared that a rate of 8 per cent was normal. Seral, annotation to Nussbaum, *Teoría Jurídica del Dinero* (1929) 135.

⁴⁴ The Canadian *Money Lenders Act*, Revised Statutes of Canada (1927), c. 135, secs. 6, 7, establishes a 12 per cent maximum rate on negotiable instruments, contracts or agreements and empowers the court to relieve the debtor of any excess. Section 4 expressly exempts small loans from the operation of the statute. A separate statute, 24-25 Geo. V, c. 56, amending sec. 111 of the *Loan Company Act*, Revised Statutes of Canada (1927), c. 28, establishes 2½ per cent per month as the maximum rate chargeable by any company chartered under this act. Still corporate debtors are not prevented from pleading usury.

Maximum interest acts exist also in some Swiss Cantons. See Hug, *op. cit. supra*, p. 237, n. 20, at 60.

⁴⁵ The following states have no maximum rates: *Colorado: Statutes Ann.*, 1935, c. 88, sec. 3 (writing required); *Illinois*, see *infra*, n. 48 and 53; *Maine: R.S.*, 1930, c. 57, sec. 142 (writing required); *Massachusetts* (as to loans exceeding \$1000): see *infra*, n. 47 and 49; *New Hampshire: Public Laws* 1926, c. 313, sec. 1 (writing required if interest is to exceed 6%); *New York*: see *infra*, n. 56. The state laws are listed in *C.C.H. Banking Laws, State Service*, Vol. II, no. 12.601. This should be used with caution however, as the charts are prepared mainly for the use of banks and consequently often do not contain the rules applicable if the creditor is not a banker.

rates vary in general ⁴⁶ from six per cent to twelve per cent.⁴⁷ In the majority of jurisdictions the penalty for usury, namely, for exceeding the maximum interest rate, consists of forfeiture of interest;⁴⁸ some statutes merely provide for forfeiture of the usurious amount,⁴⁹ a clearly inefficient sanction. (The New York law is more severe.)⁵⁰ Corporations are generally prevented from pleading usury.⁵¹ On the other hand, banking transactions are frequently subjected to more lenient provisions,⁵² and so are large loans.⁵³ Generally there are numerous and varying exceptions.⁵⁴ In a minority of states pun-

⁴⁶ Except for the Rhode Island maximum rate which is as high as 30%. *R.I. Gen. Stat.* 1923, c. 228, sec. 7.

⁴⁷ In the following eight notes only six of the more important states (California, Illinois, Massachusetts, Missouri, New York, Pennsylvania) have been considered.

California: Constitution, Art. XX, sec. 22, 10% (writing required, if exceeding the legal rate of 7%). *Illinois: Revised Statutes* 1935 (Bar edition), c. 74, sec. 4, 7% (writing required, if exceeding the legal rate of 5%). *Massachusetts: General Laws* 1932, c. 140, sec. 90 as amended by Laws of 1934, c. 179, sec. 1, 18% for loans up to \$1000; for loans exceeding \$1000 no maximum rates, *General Laws* 1932, c. 107, sec. 3. *Missouri: Revised Statutes* 1929, c. 14, sec. 2840, 8% (writing required if exceeding the legal rate of 6%). *New York: General Business Law*, secs. 370, 371, 6%. *Pennsylvania: Purdon's Penna. Statutes*, Title 41, secs. 3, 4, 6%. Factors for foreign principals may charge them 7% for advances on goods made out of the State (*ibid.*, sec. 5).

⁴⁸ *California: General Laws* (Deering, 1937), Act 3757, secs. 2, 3. Entire interest forfeited, recovery of treble interest within year after payment. *Illinois: Revised Statutes* 1935, c. 74, sec. 6. Entire interest forfeited. *Missouri: Revised Statutes* 1929, c. 14, sec. 2844. Usury avoids pledge or mortgage on personal property given as security for loan. As to interest see next note. *New York: General Business Law*, sec. 373. The loan is void, the usurer cannot recover the principal. Recovery of the treble interest within a year after payment.

⁴⁹ *Massachusetts: General Laws* 1932, c. 140, sec. 90 as amended (*supra*). Creditor cannot recover excess over 18%. *Missouri: Revised Statutes* 1929, c. 14, sec. 2842. Excess plus reasonable attorney's fee can be recovered. *Pennsylvania: Purdon's Penna. Statutes*, Title 41, sec. 4. Only the excess over 6% is forfeited, if paid it can be recovered within six months.

⁵⁰ *Supra*, n. 48.

⁵¹ *Illinois: Revised Statutes* 1935, c. 74, sec. 4, 6 [usury law does not apply to corporations]. *Missouri: Revised Statutes* 1929, c. 14, sec. 2843 as amended by H.B. 141 of 1935. *New York: General Business Law*, sec. 374. *Pennsylvania: Purdon's Penna. Statutes*, Title 41, sec. 2. *Contra, California: General Laws* (Deering, 1937), Act 3757, sec. 3.

⁵² *California: Constitution*, Art. XX, sec. 22, exempts banks from the operation of the general usury law, regulation by statute is permitted. *New York: see n. 56* under "Banks."

⁵³ *Illinois: Revised Statutes* (1935), c. 74, secs. 4, 6. Demand loans exceeding \$5000 against collateral security, no limit on interest rate, writing required. *New York: see infra*, n. 56, under "demand loans". *Pennsylvania: Purdon's Penna. Statutes*, Title 41, sec. 1, same provisions as in Illinois.

⁵⁴ See n. 56.

ishment is ordained, but imprisonment, if provided for at all, is ordinarily left to the discretion of the court.⁵⁵

In addition to these general usury laws, small loan and pawnbroker laws have been enacted in the great majority of states,⁵⁶ every state having adopted at least one of the two types, and many, both of them.⁵⁷ The small-loan ("industrial") lenders and the pawnbrokers are allowed much higher

⁵⁵ *California: General Laws* (Deering, 1937), Act 3757, sec. 3. Imprisonment optional only for first offenders, otherwise mandatory. *Missouri: Revised Statutes* 1929, c. 30, sec. 4421. Usury punishable only if interest exceeds 24%; imprisonment mandatory. *New York: Penal Laws*, sec. 2400, 1937. Punishment only in case of oppressive loans, imprisonment optional.

⁵⁶ (1) As to small loan acts. For a list of the small loan acts, see Gallert-Hilborn-May, *Small Loan Legislation* (1932) 113 [brief summaries] and *Sixth Draft of the Uniform Small Loan Law* (1935) containing statutory citations corrected up to April, 1934. The majority of the laws are based on the *Uniform Small Loans Law*, drafted under cooperation of the Russell Sage Foundation. (The legislation, however, is in constant flux.) For treatises, see Gallert-Hilborn-May, *supra*; *Sixth Draft of the Uniform Small Loan Law, supra*; Robinson and Nugent, *Regulation of the Small Loan Business* (1935); Hubacheck, *Annotations to Small Loan Laws* (1938), all published by the Russell Sage Foundation.

(2) As to pawnbrokers' acts. Raby, *The Regulation of Pawnbroking* (Russell Sage Foundation, 1924).

(3) As a related group, the credit-union laws may be mentioned. See Ham and Robinson, *A Credit Union Primer* (Russell Sage Foundation, 1930). For the New York law, see *Banking Law*, secs. 450-480.

The following tabulation made for the New York law which is by no means extraordinary, contains the more important regulations of interest rates apart from general usury law. (*General Business Law*, secs. 370-378.)

Pawnbrokers 1% to 3% monthly (*General Business Law*, sec. 46); Small loans, loans up to \$300 given by professional money lenders, 2½% to 3% monthly (*Banking Law*, sec. 352); Credit Unions, 1% monthly (*Banking Law*, sec. 453(5)); Savings (Building) and Loan Associations, under certain conditions no limit (*Banking Law*, sec. 385); Personal Loan Departments of Banks, maximum 12% (*Banking Law*, sec. 108 (2)); Loans Secured by Assignment of Future Wages, 18% (*Personal Property Law*, sec. 42(5)); Banks and Trust Companies, Private Bankers, Industrial Banks, Investment Companies, forfeiture limited to interest, special Statute of Limitations (*Banking Law*, secs. 108(1), 173, 293a, 510a); Demand Loans Exceeding \$5,000 on Collateral Security, no limit; writing required if interest exceeds 6%, unless the creditor is a Bank or a Trust Company (*General Business Law*, sec. 379; *Banking Law*, sec. 108 (3)).

See also the list of exemptions from the general usury law in *California Constitution*, art. XX, sec. 22. (Building and Loan Associations, Industrial Loan Companies, Credit Unions, licensed pawnbrokers or personal property brokers, various types of non-profit cooperative agricultural associations.)

⁵⁷ In many jurisdictions, pawnbrokers' activities are regulated by pawnbroking laws rather than by small loan laws. See in this connection: *Illinois: Rev. Stat.* (1935), c. 74, sec. 14-25; *Massachusetts: Gen. Laws* (1932), c. 140, sec. 70-85; *New York: Gen. Bus. Law*, sec. 40-52. Raby, *The Regulation of Pawnbroking* (Russell Sage Foundation, 1924).

interest (an average of 3½ per cent) monthly than is generally permitted; yet they must have a license, and are subject to supervision by the state authorities, a scheme adopted later on by English legislation.⁵⁸ Banking business is exempt from this regulation, but corporate debtors may avail themselves thereof. Penalties are considerably stricter than in the case of the maximum-interest laws. Under almost all of the State laws, wilful violation of small-loan laws is a misdemeanor, and under the great majority of them it renders the loan void or not enforceable. Although a few laws only provide for criminal and administrative measures, none of those providing a civil sanction confine it to recovery of excess interest. The pawnbrokers' laws, which likewise allow higher than the general maximum-interest rates, also deal with protection against concealment of stolen goods and with other matters not in point here.

The variety of the legislative picture is augmented by federal legislation which, although unable to control maximum-interest rates in general, may prescribe maximum rates for national banking and credit institutions. It has been provided that national banks may charge the maximum rate of the State of their location, or one per cent above Federal Reserve discount rate, whichever is higher.⁵⁹

The arithmetical standards imposed by the general usury laws, and other technical features embodied in them, are highly provocative of attempts to evade the law. Although courts pay tribute to the principle that evasion of the law should not be permitted,⁶⁰ they are rather lenient with such attempts and are apt to impede the defense of usury by increasing the debtor's burden of proof.⁶¹ In one famous New

⁵⁸ *Supra*, p. 239.

⁵⁹ Act of June 16, 1933, sec. 25, 48 Stat. 162 at 191, 12 U.S.C. 85. Numerous other federal credit institutions are by federal law likewise placed under special interest restrictions. It may suffice to mention the Farm Credit Administration [loans to cooperative associations], Act of June 15, 1929, sec. 8, 46 Stat. 11 at 14, 12 U.S.C. 1141f, and the U. S. Housing Authority [loans to Public Housing Agencies], Act of Sept. 1, 1937, sec. 9, 50 Stat. 888 at 891, 42 U.S.C. 1409.

⁶⁰ *Chakales v. Djiovanides*, 161 Va. 48, 170 S.E. 848 (1933); *Castleman v. Canal Bk. & Trust Co.*, 171 Miss. 291, 156 So. 648 (1934).

⁶¹ See Restatement, *Contracts* (1932), sec. 526, special note: "It seems . . . true that the severer the consequences of usury under a local statute, the more inclined the courts are to withdraw doubtful cases from the operation of the statute." And *New York Annotations* to this Restatement (1933) at sec. 526: "Due to the harshness of the

York case the borrower, a small real estate owner, upon demand of the prospective lender, formed a one-man corporation to which he transferred his real estate. The corporation then received the loan, having apparently no other function. Held, by a unanimous court, that usury could not be pleaded.⁶² Thus the statutory exemption, so important because of the formidable spread of corporations in American business, was expanded to include a legal entity created specifically and exclusively for the purpose of evading the usury statute.

The attitude of the courts in conflict of usury laws is remarkable. Where the domestic usury law is stricter than the foreign law, the American courts refrain from using the "public policy" argument as a means of imposing their usury law on foreign contracts,⁶³ a device sometimes employed by foreign courts.⁶⁴ On the contrary, American courts have established a presumption in favor of the applicability of that law which would be most efficient in the maintenance of the transaction;⁶⁵ or else they have used the normal conflict-of-laws

New York usury law the defense is not favored, and in case of doubt a rather heavy burden of proof is thrown upon the person asserting that a bargain is usurious."

⁶² *Jenkins v. Moyse*, 254 N.Y. 319, 172 N.E. 521 (1930), Chief Judge Cardozo on the bench. Contrast with this case *Shapiro v. Wilgus*, 287 U.S. 348 (1932), where the Supreme Court of the United States held, per Mr. Justice Cardozo, that an individual could not obtain the benefits of an equity receivership by incorporating.

⁶³ The only case holding in a certain sense to the contrary seems to be *Sime v. Norris*, 8 Phila. 84 (Pennsylvania Supreme Court at *nisi prius*, 1871). There a note made and payable in California provided for 30 per cent interest to be compounded monthly, which was in accord with the California law. The Pennsylvania court refused to enforce the interest provisions beyond the California "legal" (not "maximum") rate (10%). A dictum in *Phinney v. Baldwin*, 16 Ill. 108 (1854), indicates that the court may refuse interest provisions valid under the law of the contract but excessive according to the law of the forum. On the other hand, a dictum in *O'Toole v. Meyenburg*, 251 Fed. 191 (C.C.A. 8th, 1918), states that "it is not, generally speaking, against public policy to enforce a contract usurious at the forum but valid at its situs."

⁶⁴ Thus *Reichsgericht*, Feb. 20, 1880, *E.G.Z.* 1, 59; Jan. 29, 1881, *E.G.Z.* 5, 254 at 260, regarding prohibition of contracting for compound interest; Austrian Supreme Court, Aug. 16, 1889, 27 Glaser-Unger, *Sammlung von Zivilrechtlichen Entscheidungen* 519 no. 12864, regarding interest on recorded mortgages. French courts, however, in the case of loans made outside of France do not require the observing of French maximum interest. *Cour de Cassation*, Feb. 19, 1890, *J.D. Int.* 1890, 495, and decisions of lower courts cited by Surville, *Droit International Privé* (7th ed., 1925) 366, n. 1.

⁶⁵ *E.g.*, *Green v. Northwestern Trust Co.*, 128 Minn. 30, 150 N.W. 229 (1914); *Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, 77 F.(2d) 152 (C.C.A. 9th, 1935); under the same policy the courts allow the parties to select by their contract the most lenient law among several eligible. *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927).

theories which determine the legal system applicable on the basis of the place of contracting or the place of performance or similar territorial "contacts" of the transaction involved.⁶⁶

This state of law is certainly not satisfactory. It is, however, bearable, on the whole, and it conforms to the traditions and to the spirit of the American community.⁶⁷ The majority of people feel that something has to be done about usury. On the other hand, many adhere to the tenets of the classical school of economics as expounded by Bentham in his famous "Letters in Defense of Usury" (1787); the belief in freedom of contract and the conviction that legislative encroachments on interest rates are futile, still exists, and it is these policies that are probably behind the reserved attitude of the courts. There is also a very definite reluctance to adopt an "anti-excessiveness" statute of the English type, not to mention the extreme German device. Adequate handling of the broad concepts involved in the "anti-excessiveness" doctrine requires a confidence in the courts which does not exist here as it does in England. A clear-cut yardstick is what the American businessman requires; he does not like anything which smacks of judicial scrutiny of his conscience. The effect of the maximum interest laws is by no means negligible, as appears from the great number of usury cases; the lenient attitude of the courts is partly responsible for the lack of still greater efficiency.

The small-loan and pawnbrokers laws seem to work well, primarily because of their administrative features. Through permanent supervision and the threat to recalcitrant lenders of license withdrawal, the law is efficiently enforced. Moreover, in this field, the courts do not evince a lenient attitude towards evasion.⁶⁸ While pawnbroker laws also exist in many

⁶⁶ See 2 Beale, *Treatise on the Conflicts of Laws* (1935) 1241.

⁶⁷ The basic principles developed by the courts in the application of the usury laws have been set out in the Restatement, *Contracts* (1932), secs. 526-537, without distinguishing between general usury and small loan legislation. The laudable effect is a firmer attitude against usury.

⁶⁸ The material is collected by Hubacheck, *op. cit. supra*, n. 56, at 156. On the frustrated efforts of New York money lenders to evade the New York Small Loans Law by moving out of the State and by doing their business by mail, see Maguire, *The Lance of Justice* (1928) 124.

In conflict-of-laws situations likewise, the attitude of the courts is stricter. See, e.g., *Personal Finance Co. of Council Bluffs v. Gilinsky Fruit Co.*, 127 Neb. 450, 255 N.W. 558 (1934), *cert. den.* 293 U.S. 627 (1935); *Continental Adjustment Corp. v. Klause*, 12 N.J. Misc. 703, 174 Atl. 246 (1934); *Folsom v. Continental Adjustment Corp.*, 48 Ga. App. 435, 172 S.E. 833 (1934), all invalidating, because of the public policy of the forum, foreign small loan contracts valid under their "proper law".

European countries,⁶⁹ the small-loan laws, which are more essential, form an indigenous and very valuable American contribution to the evolution of usury law. Certainly the crimes of the "loan sharks" have not yet been suppressed, but that is not the fault of the law.

V. The Present Situation

While the usury problem has been for centuries one of the foremost jural-economic battlegrounds, its significance has diminished in recent times through the improvement of credit organization and the increasing appropriation of public funds for the benefit of the less moneyed class. Interest rates have become more regulated and standardized. Nowadays they have even been subjected to compulsory reduction.⁷⁰

On the other hand, contemporary monetary troubles have engendered novel phenomena which invite one to reconsider the usury problem.

Novel and highly dangerous tensions have appeared in the field of interest, as a result of the monetary crisis of the post-war period. When in Germany, during the great inflation, the "*rentenmark*" was created in November, 1923, and stabilized through a terrific process of deflation,⁷¹ the following rates were held "reasonable" and "very moderate" (*sic*) by the *Reichsgericht*:⁷² 6% *daily* from Nov. 2, 1923, until Dec. 10, 1923; 1% *daily* from Dec. 11 until Dec. 31, 1923; 30% annually from Jan. 1 until June 30, 1924; 24% annually from July 1 until Sept. 30, 1924; 18% from October 1, until Dec.

⁶⁹ See Wahl and Blomeyer, art. "*Pfandrecht*" in 5 *Rechtsvergleichendes Handwörterbuch* (1935) 620. The discussion of Raby, *loc. cit. supra*, p. 243, n. 56 (1), at 27, is entirely erroneous on this point.

⁷⁰ Germany, Decree of Dec. 8, 1931, Part I, c. 3, secs. 1, 2, *R.G. Bl.* 1931 I 699 at 702; France, Decrees of July 16, and Aug. 8, 1935, *D.P.* 1935 IV 189. Reductions in interest rates decreed by the Victoria and New South Wales legislatures have raised important conflict of laws problems as was shown when New Zealand corporations which were sued for interest on coupons payable in Melbourne availed themselves of those reductions. *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.*, [1938] A.C. 224 (Privy Council, 1937); *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Providence Soc.*, 50 C.L.R. 581 (High Court of Australia, 1934); see *infra*, sec. 30 at n. 19.

⁷¹ Schacht, *The Stabilization of the Mark* (1927) 151; Baumgartner, *Le Rentenmark* (2d ed. Paris, 1925) 117; Bresciani-Turroni, *The Economics of Inflation* (tr. by Sayers, 1937) 359.

⁷² Judgment of Sept. 18, 1929, *J.W.* 1929, 3490.

31, 1924; 12% for 1925. These and higher⁷³ rates were not only held lawful by the courts, but granted as implied conditions of contract between banks and their customers.⁷⁴ The *Reichsgericht* pointed out that the rates included the necessarily high "risk premium" against further depreciation of the mark, a premium which after the appearance of stabilization was justifiable in view of the uncertainty of the lasting effect of the stabilizing measures.⁷⁵ It is remarkable that this legal development occurred in the country which possessed the harshest legislation against usury. In truth, the German post-war events were extreme and probably unique, but inflation, which necessarily results in deflation, is always imminent under a managed currency. The German example at least makes graphic the interdependence of interest rates and the currency situation, under present conditions. This interdependence furnishes another argument against entirely rigid maximum interest rates, but this fact is probably not of sufficient weight to influence the existing American policy.⁷⁶ In fact, one can hardly shape the law with an eye to the contingency of inflation. If such an event should occur emergency will dictate the law.

⁷³ Generally the customary lending interest rate was indicated as 10% daily from Nov. 15 until Nov. 30, 1923; 6% and later 3% to 1% daily to Dec. 31, 1923; 1% daily from Jan. 1924. *Reichsgericht*, Feb. 19, 1927, 27 *Bankarchiv* 276; Jan. 30, 1929, 28 *Bankarchiv* 280. See also Bresciani-Turroni, *op. cit.*, at 360.

⁷⁴ In addition to the cases cited *supra*, see *Reichsgericht*, April 22, 1926, *J.W.* 1926, 2683; Oct. 1, 1927, *R.G.Z.* 118, 165; April 6, 1932, *ibid.* 136, 56; *Reichsgericht*, Oct. 21, 1924, 58 *Entscheidungen in Strafsachen* 321; Appellate Court of Berlin (*Kammergericht*), Oct. 24, 1924, 23 *Bankarchiv* 249; March 21, 1929, *J.W.* 1929, 2164 no. 3. Much pertinent material is offered by the opinions rendered to the courts by the Berlin Chamber of Commerce and published in "*Mitteilungen der Handelskammer Berlin*", see, e.g., 1928, 1133; 1929, 613.

⁷⁵ Judgment of Jan. 30, 1929, 28 *Bankarchiv* 280.

⁷⁶ Still it might be worthwhile to consider entrusting competent administrative bodies with the task of fixing the maximum interest rate according to changing conditions. This has been done in various states: *Indiana: Burns Statutes Ann.* 1935, sec. 18-3002; *Iowa: Code* (1935), c. 419 F 1, sec. 9438 f. 13 (2); *Massachusetts: General Statutes* (1932), c. 140, sec. 100; *Wisconsin: Statutes* (1937 ed.), sec. 214.07(2). The method of adapting legal interest to official discounting rates, *supra*, p. 234, n. 9, is similar.

CHAPTER V

DEBTS UNDER FLUCTUATING CURRENCIES

SECTION 22

THE IMMUTABILITY OF THE NOMINAL AMOUNT

I. *The Principle of Immutability*

Since a debt, as was pointed out,¹ is defined by its monetary unit, together with the figure that accompanies it, changes in the monetary field which have no bearing either upon such unit or figure do not affect the debt. This is particularly true of changes affecting the metal value, purchasing power, or rate of exchange of the unit. There is in continental literature a good deal of opposition to this corollary of the "nominalistic" doctrine,² but on closer examination it will

¹ *Supra*, p. 212.

² Thus by Hubrecht (later writing under the name of Hubert), *La Dépréciation Monétaire et l'Exécution des Contrats. Stabilization du Franc et Valorisation des Créances* (1928), a volume which, however, is very much at variance with actual French law and the great majority of French writers; Wahle, *Das Valorisationsproblem in der Gesetzgebung und Rechtsprechung Mitteleuropas* (Vienna, 1924); Stampe, "Das Deutsche Schuldentilgungsrecht des 17. Jahrhunderts", (1925) *Sitzungsberichte der Preussischen Akademie der Wissenschaften (Philologisch-Historische Klasse)* 2, and a number of further studies published by the same writer in (1926) *Sitzungsberichte* at 37, and in the *Abhandlungen* of the same Akademie (and the same *Klasse*) 1928, 1931, and 1932, presenting ample material of monetary legal history, chiefly French. Unfortunately, they partly misinterpret facts and lack clarity of legal analysis. See Ascarelli, *La Moneta* (1928) 293; Jastrow, *Die Prinzipienfragen in den Aufwertungsdebatten* (1937) 100; Taeuber, *Molineaus' Geldschuldlehre* (1928) 34. In this country the publications by Eder, "Legal Theories of Money", (1934) 20 *Corn. L.Q.* 52, and "The Gold Clauses in the Light of History", (1935) 23 *Geo. L.J.* 359 and 721, are basically anti-nominalist. Writings taking the nominalist point of view are numerous. Reference may be made to Ascarelli, *La Moneta* (1928); Guisan, *La Dépréciation Monétaire et ses Effets en Droit Civil* (1934); Gény, "Cours Légal et Cours Forcé en Matière de Monnaie et de Papier-Monnaie", *Revue Trimestrielle de Droit Civil*, 1928,

be found that the existing controversies do not touch the basic problem under discussion. No antinomialist has ever advanced the proposition that the amount of circulating media to be paid by the debtor necessarily and exactly corresponds to the daily, and sometimes hourly, fluctuations of the market price of gold, or of the rate of exchange, or of the purchasing power. Even in the German revaluation movement the focal point was merely an equitable restoration of debts entirely destroyed through the collapse of the mark. After the eclipse of the French *assignats*, there was also a similar reestablishment of vanished debts by "scaling" statutes, and like reestablishments have occurred in other periods of monetary history.³ However, the phenomenon of a fading debt is, in itself, evidence of the truth of the nominalistic view. Revaluation can only be remedial. As a matter of fact, it is the nominalistic view which makes inflation and deflation, and the alteration of the economic value of debts generally perceptible and measurable.

During the middle ages a "metallistic" doctrine was applied to loans;⁴ that is, the object of a loan was considered to be a definite quantity of silver or gold.⁵ But that was a time of monetary imbroglio, characterized by a multitude of coining potentates, by roughness, lack of uniformity, incessant alterations and rerating of coins, melting down and emigration of the better types, and, generally, by monetary abuses committed by rulers as well as subjects.⁶ There was nothing approaching a homogeneous modern system efficiently organized and controlled by the government of a large territory. Therefore, in making payment money was frequently weighed,

5; Henggeler, "Die Abwertung des Schweizerfrankens und ihr Einfluss auf die Zivilrechtlichen Verhältnisse", *Zeitschrift für Schweizerisches Recht*, 1937, 158a; Rosset, "La Dévaluation du Franc Suisse et ses effets en droit civil", *ibid.* 1937, 260a. Piret, *Les Variations Monétaires et Leurs Répercussions en Droit Civil Belge* (1935) is purely descriptive in nature.

³ See *infra*, p. 284.

⁴ This has been demonstrated particularly by G. Hartmann, *Über den Rechtlichen Begriff des Geldes und den Inhalt von Geldschulden* (1868) and by Taeuber, *Geld und Kredit im Mittelalter* (1933). The Roman rule was nominalistic. Ascarelli, *La Moneta* (1923) 4 at n. 3.

⁵ As early as 1200 Pope Innocent III adjudicated an ecclesiastical case on a metallistic basis. See Taeuber, *op. cit. supra*, n. 4, at 107 and 309. The case involved an old impost running in terms of a local type of "denars" which had long disappeared from circulation. Considering the absence of "recasting" rates, the metallistic decision was a matter of course. Recasting rates were absent frequently indeed.

⁶ See Jastrow, *op. cit. supra*, n. 1, at 42, 55.

particularly where considerable amounts were involved.⁷ At the same time the object of major debts was customarily articulated, directly or indirectly, with a definite quantity of coined gold or silver.⁸ Under such conditions it was a workable and fair rule to have the borrower return the "intrinsic" value of the coin received, even in the absence of an explicit stipulation to that effect. Thus the lender, denied interest for the use of capital under canonical law, was at least protected against loss through monetary changes. This medieval proposition was in the nature of a rule peculiar to loans rather than an application of a general monetary theory.⁹ In a more advanced economy, it was refuted by the famous French jurist, Molineaus (1500-1566), who also opposed the ecclesiastical anti-interest rule.¹⁰ The metallistic tenet lost its ground as governments succeeded in having the monetary unit represented in appropriate fractions and multiples, by coins readily accepted by the community, which gradually became accustomed to rely, even in major payments, on the "name" of the coins.

Under a modern monetary system, the medieval doctrine has no actual significance. The rule favoring nominal value was laid down in England, in a very distinct and impressive manner, as early as 1604 in the *Case of Mixt Monies in Ireland*.¹¹ There it was held that the debtor, Brett, was entitled

⁷ Taeuber, *op. cit. supra*, n. 4, at 195; so even in England, 1 Cunningham, *The Growth of English Industry and Commerce* (5th ed., 1910) 326, n. 5.

⁸ Examples in Taeuber, *op. cit. supra*, n. 4, at 96.

⁹ On this, see Taeuber, *op. cit.*, n. 1, at 85 and *passim*. The author points out that the old metallistic doctrine was derived from the broad Roman conception of *mutuum* (loan); the rule that borrowed wheat or wine had to be restored in the same quantity and quality, having been carried over to coin borrowed. Behind the legalistic coordination of wheat, wine and coin there was, of course, an indistinct, commodity-like notion of money, not sufficiently heeded by Taeuber, but well indicated by Ascarelli, *La Moneta* (1928) 10.

¹⁰ Molineaus, *Tractatus Merciorum [or Contractuum] et Usurarium* (first published in 1546) is in point. According to Taeuber, *op. cit. supra*, n. 1, the historical significance of Molineaus' doctrine does not consist in his nominalistic tenet but rather in the fact that Molineaus was the first to develop a doctrine of debts in terms of a general theory of money. This view seems to be strongly over-emphasized by Taeuber.

¹¹ *Brett v. Gilbert*, Davis 18, 80 Eng. Rep. 507. This case has been strongly criticized from a metallistic point of view by Eder in his article on gold clauses, *supra*, n. 2, at 722, 731. However, the arguments advanced by Mr. Eder bear only on the King's power to debase

to discharge his debt of one hundred pounds in debased coin of the same nominal amount, the debasement having been ordered by Queen Elizabeth subsequent to the establishment of the debt. "Although at the time of the contract and obligation made . . . pure money of gold and silver was current within this Kingdom . . . yet the mixed money, being established in this Kingdom before the day of payment, may well be tendered in discharge of the said obligation, and the obligee is bound to accept it." The court expressly cites Molinaeus amongst others as authority for the rule applied. In England since that time, no attempt has been made to question the nominalistic principle. This is true for the depreciation of the pound during the Napoleonic War and its appreciation afterwards as well as for developments during and after the World War. Today the very existence of a nominalistic-metallistic problem appears to be ruled out of the English discussion. In the United States "dischargeability" by depreciated money, of debts incurred before such depreciation, was, on broad grounds, judicially certified by the *Legal Tender* cases,¹² which in this connection rely expressly on the *Mixed Money* case. The colonial and continental inflations sufficiently illustrate the operation and efficiency of the nominalistic rule. A more recent application of the nominalistic doctrine is to be found in an Iowa case of 1934,¹³ where a mortgagor in order to avoid foreclosure tendered less than the nominal amount, on the ground that the dollar had gained in purchasing power since the time of the loan. The court, "while sympathizing with the appellant [the mortgagor]",

the coin, hence on a problem of old English constitutional law, and not on the question of how a valid devaluation affects existing debts. His arguments prove nothing more than that there was later a criticism of the *Mixed Money* case. Incidentally there is no disagreement as to the fact that debasement of coins is generally undesirable and that the English constitutional rule changed in the 18th century. For other expressions of the nominalistic doctrine in the common law, see *Pong v. Lindsay*, 1 Dyer, 82 b, 73 Eng. Rep. 179, marginal note 71, "*car nummus est mensura sibi ipsi, aliter de fromento.*" And Scrutton, L.J., in *The Baarn*, [1933] P. 251, 265 (C.A., 1933) "A pound in England is a pound whatever its international value."

¹² 12 Wall. (79 U.S.) 457, 548. An explicit demonstration of the nominalistic principle with an eye to continentals is to be found in the early case of *Hollingsworth v. Ogle*, 1 Dallas 257 (Pa., 1788).

¹³ *Federal Land Bank of Omaha v. Wilmarth*, 218 Iowa 339, 252 N.W. 507 (1934). There had been rural riots at that time in the Middle West.

overruled the claim, saying, "he has cited us no law, and we are unable to find any, through which we may grant him the relief which he asks".¹⁴

In France the nominalistic doctrine had been proclaimed with particular firmness and clarity by Pothier (1695-1772), who considers it to be *l'usage constant dans notre jurisprudence*.¹⁵ It also dominated the revolutionary period¹⁶ and was incorporated in the famous Article 1895 of the French Code Civil.¹⁷ Although the rule, in accord with the old tradition, is couched in terms of loan and placed in the chapter on loans, there is no doubt of its applicability to all debts.¹⁸ There is some dispute, mainly academic, as to whether the principle enunciated by Article 1895 applies only to debasement of coin or whether it comprises every depreciation, including a depreciation of paper money.¹⁹ Actually, however, the second alternative is the valid one;²⁰ and despite the repeated and tremendous depreciations of the franc, no effective attempt at revaluation, either judicial or legislative, has ever been made.²¹

¹⁴ *Ibid.* at 351, 252 N.W. at 513.

¹⁵ Pothier, *Traité du Prêt de Consommation*, n. 36 (5 Pothier, *Oeuvres* [Siffrein, 1821] 403).

¹⁶ 35 Dalloz, *Répertoire Méthodique* 13, sub. tit. "*Papier-Monnaie*"; *Revue du Droit Bancaire* 1924, 77.

¹⁷ "The obligation resulting from a loan in money is always simply for the amount in figures indicated in the contract. If there has been an increase or diminution of specie before the time of payment, the debtor must return the numerical amount lent and must return this amount only in the specie current at the time of payment." On the genesis of art. 1895, see Gény, "*La validité juridique de la clause 'payable en or'*", *Revue Trimestrielle de Droit Civil* 1926, 557; Hubrecht *op. cit. supra*, n. 2, at 89.

¹⁸ See Lalou, *D.P.* 1924 II 18 at 20 with references.

¹⁹ This is denied by Hubrecht, *op. cit. supra*, n. 1, at 101, who advances the doctrine that nominalism is an "exceptional" rule. But certainly it is even more appropriate for paper money than for coin. The narrow doctrine was used by the Mixed Appellate Court of Alexandria, May 19, 1927, *J.D. Int.* 1928, 765, in interpreting art. 577 of the Egyptian *Mixed Civil Code*, which is almost literally taken from art. 1895 of the French Code. However, in the Egyptian legislation, *franc* seems to signify *gold franc*, *infra*, p. 319.

²⁰ Says Professor Picard, a noted French commercialist, *J.D. Int.* 1924, 918, giving references "No French court will ever allow revaluation as a result of the depreciation of the franc."

²¹ *Infra*, p. 265. Hubrecht, *op. cit.*, at 446 supports the contrary view primarily by appeal to an early post-war judgment of a rural court of first resort, the confused arguments of which Mr. Hubrecht himself rejects. (*Tribunal Civil* of Gap, Mai 5, 1922, *D.P.* 1923 II 17). Furthermore, he cites gold clause cases, cases of cattle leases (*baux à cheptel*, *infra*, p. 259, n. 47) and other examples which do not affect the basic principle of art. 1895.

The French model was taken over literally by the Italian,²² the Spanish,²³ and the other Latin Codes,²⁴ as well as by the Dutch Code.²⁵ However, the last, in force since 1838, and the Italian Code, by special provisions, protect specie clauses stipulated in favor of money lenders who have supplied the debtor with coin of the stipulated kind,²⁶ an exception which clearly demonstrates the general prevalence of the nominalistic principle.

Identity of the non-depreciated monetary unit with the depreciated has been universally recognized even where the unit was foreign; and this despite the fact that foreign money is much more closely related to commodities than is domestic money.²⁷ In a case concerning German marks, Mr. Justice Holmes made the broad statement that: "Obviously, in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same".²⁸

The principle of immutability applies to both depreciations and appreciations of the monetary unit. There have been considerable appreciations. Outstanding is the appreciation of the dollar by more than a hundred per cent from 1864 to 1878. A number of similar processes occurred after the World War. Thus the English pound had depreciated about thirty per cent by 1920, and the Dutch guilder fell about twenty-five per cent some time in the same year;²⁹ but they wholly recovered within a few years. The Italian lire was stabilized in 1927 about twenty-five per cent above its average level since 1922, and more than fifty per cent above its lowest level, which was reached in August, 1926. In all these cases the burden of debtors who had contracted their debts in depreciated money was made heavier. However, very seldom were attempts made by debtors to urge as a legal defense the mere improvement of the currency.³⁰ Practically, there-

²² *Codice Civile* 1821. The significance of the nominalistic conception within the Italian monetary system was pointed out by the Italian Court of Cassation, May 30, 1927, *Monitore dei Tribunali* 1928, 91.

²³ *Código Civil Español* 1170; *Código de Comercio Español* 312.

²⁴ Thus by the Belgian Code 1895, 2199.

²⁵ Art. 1793.

²⁶ *Ibid.* at art. 1794; Italian Civil Code 1822.

²⁷ Particularly so in the opinion of American courts. *Supra*, p. 113.

²⁸ *Deutsche Bank Filiale Nürnberg v. Humphrey*, 272 U.S. 517 at 519 (1926).

²⁹ See *Memorandum on Currency 1913-1922* (League of Nations, 1923), Tables, p. 43.

³⁰ Illustrative of the effects of dollar appreciation is *The Vaughan*

fore, the problem of fluctuating currencies in a chapter on debts is almost entirely a problem of depreciation.³¹

II. Adaptable Debts—Damages

Although the nominalistic principle has been theoretically and actually accepted, its boundaries are still to be charted. Obligations purporting the payment of a sum certain are its proper area. The method of determining damages and other unliquidated claims under a fluctuating currency is still problematic, however. As was pointed out, the "legal-constancy" doctrine postulates that the legal ratio between the monetary unit and the gold value involves a fictitious stabilization of the unit without regard to its actual depreciation or appreciation in terms of gold value, purchasing power, etc.³² Fluctuations of the unit in such terms are not given judicial cognizance under this doctrine. A case decided by the Supreme Court of the United States is illustrative. When the holder of gold certificates claimed damages from the federal government, incurred through the confiscation of the certificates on January 17, 1934, the Court dismissed the claim partly on the ground that on that day the statutory equation of one dollar to 25.8 grains of standard gold was still in force;³³ that de-

and *Telegraph*, 14 Wall. (81 U.S.) 258 (1872). The debtor had to pay a much higher value as a result of his unsuccessful appeal, the Supreme Court having no power to change the dollar amount awarded by the lower court. See also *Huss v. Kempf*, 12 Fed. Cas. No. 6,944 (S.D. N.Y., 1879), the Iowa case cited *supra*, n. 13, and the *Reichsgericht* case of 1938, *infra*, p. 260, n. 49. An express statement to the effect that the debtor must bear an appreciation of the stipulated (Jugoslavain) currency, is found in a judgment of the Hungarian Supreme Court, 1934, *Z.A.I.P.* 1937, 693, no. 29. In *Winslow v. Bloom*, 1 Hayw. (N.C.) 217 (1795), the parties had contracted in terms of Spanish milled dollars at a time when a North Carolina shilling was equivalent to a twelfth of a dollar. Thereafter the North Carolina shilling appreciated to one-tenth of the dollar. The creditor was awarded a sixth less than the shillings given by him. But in this case a dual-currency situation was presented.

³¹ For discussion of the influence of fluctuating currencies upon accounting and balance-sheets, a matter not considered in this volume, see Bresciani-Turroni, *The Economics of Inflation* (trans. by Sayers, 1937) 274; Sweeny, *Stabilized Accounting* (1936); Schkaff, *La Dépréciation Monétaire et ses Effets en Droit Privé* (1925) 241; Schmalenbach, *Dynamische Bilanz* (4th ed., 1926) 217; Wahle, *op. cit. supra*, n. 2 at 33; W. Rieger, *Ueber Geldwertschwankungen* (1938) [strongly advocating a strictly nominalist point of view]. Regarding taxation, see *supra*, p. 132.

³² *Supra*, p. 14.

³³ *Nortz v. United States*, 294 U.S. 317 (1935) (one of the gold clause cases). Similar views were advanced by the English Court of

valuation to 15-5/21 grains was decreed on January 31, 1934. *Depreciation* of the dollar, however, had reached approximately the same level on January 17, raising the world market price of an ounce of fine gold to about \$35, and accordingly raising the value of the gold dollar coins in terms of the world market value about sixty per cent. Whether the holder of the certificate could avail himself of the world-market rate is a troublesome question; but admitting that he could, one can hardly deny that he suffered a loss of sixty cents of the face amount on every dollar. Suppose the case of a statute or a contract explicitly providing for payment in terms of the market value of a commodity. The market value will reflect, and is considered by the parties to reflect, all the fluctuations of the price of the commodity involved, regardless of whether those fluctuations are influenced by, or are independent of, changes in the monetary standard. The provision for payment of the market value, therefore, will hold good, although the market has risen owing to a depreciation of the monetary unit, the old legal ratio of which is still in the statute books. Similarly, real market conditions should prevail where damages are to be calculated under a depreciating currency. Hence the New York Court of Appeals, during the greenback period, was correct in taking into account the depreciation of the dollar in the determination of damages.³⁴ The same principle was recognized by the *Reichsgericht*³⁵ and the high-

Appeal in *The Baarn*, [1933] P. 251 (C.A., 1933). In the United States during the greenback period a legal-constancy doctrine was frequently used in computing damages. See cases collected in Dawson and Cooper, "*Northern Inflation Cases*", (1935) 33 *Mich. L. Rev.* 852 at 882. Even a depositor of gold coin, claiming damages from his depository, was granted damages under that theory for only the nominal dollar amount. *Warner v. Sauk County Bank*, 20 Wis. 492 (1866). See, however, next note.

³⁴ *Simpkins v. Low*, 54 N.Y. 179 (1873), and other cases cited by Dawson and Cooper, *supra*, at 887. In *Simpkins v. Low*, *supra*, at 185, the court said: "Why should a court be the only place where men must affect an ignorance of what all men know?" The correct point of view appears as early as 1795 in a well-reasoned annotation to *Winslow v. Bloom*, 1 Hayw. (N.C.) 217 (1795).

³⁵ *Reichsgericht*, March 12, 1921, R.G.Z. 101, 418 (dealing with loss of stored goods); *Reichsgericht*, June 13, 1921, R.G.Z. 102, 383 (dealing with an injury wrongfully done to a horse).

³⁶ Austrian Supreme Court, Assembled Senates, June 18, 1924, 6 *Die Rechtsprechung* 173. However, in a case where a private tutor had sold his service on the basis of the bread price, the Supreme Court surprisingly allowed only the price as of the time of the lessons given, despite the later depreciation of the money. Judgment of May 23, 1923, Coulon, 6 *Mitteilungen des Verbandes Oesterreichischer Banken und Bankiers* 250.

est courts of Austria³⁶ and Belgium,³⁷ sensibly distinguishing damages granted in terms of the depreciated currency from "revaluation" of debts.³⁸ (Absence of that distinction is a frequent shortcoming of writings on revaluation.)

Even where changes in purchasing power result from general economic trends without an alteration in the monetary system, American courts generally make allowance for such changes in determining damages for personal injuries.³⁹ Devaluation, in itself, however, does not justify an increment in damages. This was recognized by the Belgian legislation when Belgium in 1935 again devalued her franc. It was then provided that with respect to damages, devaluation was to be considered only to the extent that the purchasing power of the franc in the pertinent field ("*dans le domaine envisagé*") has changed up to the day of evaluation.⁴⁰

A particularly important problem of damages arises where a money debtor does not pay at the time of maturity and

³⁷ *Cour de Cassation*, Jan. 17, 1929, 23 *Revue de Droit Maritime Comparé* 91; *Cour de Cassation*, Feb. 26, 1931, 25 *ibid.* 75; App. Court of Liège, July 13, 1937, *La Belgique Judiciaire* 1937, 470.

³⁸ Explicitly so *Reichsgericht*, May 23, 1923, *J.W.* 1924, 1868; Oct. 11, 1924, *ibid.* 1925, 230; Sept. 18, 1926, *ibid.* 1927, 1148; Nov. 30, 1926, *ibid.* 1927, 981.

³⁹ *Louisville & N. R. R. v. Williams*, 183 Ala. 138, 62 So. 679 (1913); *Martin v. Pacific Gas & Elec. Co.*, 255 Pac. 284 (Cal. App., 1927), *aff'd* 203 Cal. 291, 264 Pac. 246 (1928); *Posch v. Chicago Ry.*, 221 Ill. App. 241 (1921); *Dole v. Orleans Ry. & Light Co.*, 121 La. 945, 46 So. 929 (1908); *Valley v. Scott*, 126 Me. 597, 138 Atl. 311 (1927). Collections of cases may be found in "Notes" (1919) 3 *A.L.R.* 610; (1921) 10 *A.L.R.* 179; (1922) 18 *A.L.R.* 564; (1929) 60 *A.L.R.* 1395. For an instance where the court took account of the increased purchasing power of money, see *Johnson v. St. Paul Ry.*, 67 Minn. 260, 69 N.W. 900 (1897). But cf. *Palmer v. Security Trust Co.*, 242 Mich. 163, 218 N.W. 677 (1928), modifying a verdict by which the jury had awarded to a wage-earner who had been seriously injured by a bus, \$74,000 damages instead of \$37,000 on the theory that the dollar had lost half its purchasing power. The court applied the dollar-for-dollar rule, advancing the obscure reason that the halving process should have been extended to the "wage-earned dollar" as well as to the "compensating dollar". However, the verdict was wrong inasmuch as it assumed that the wage-earner without the accident would have earned the double amount and that the then existing and actually temporary loss in purchasing power would persist.

⁴⁰ Law of April 29, 1935, *Bulletin Usuel des Lois*, 1935, 504; see *Bull. I.I.J.* 33, 91; Moreau, *La Clause-Or* (1935) 14. For a construction of the law, see Appellate Court of Liège, July 13, 1937, *La Belgique Judiciaire*, 1937, 470. The same court, May 5, 1937, *Jurisprudence de la Cour d'Appel de Liège*, 1937, 226, in granting a worker damages for personal injury, found the purchasing power of the franc to have dropped 15 per cent, which decrease, however, was offset, in the opinion of the Court, by the fact that the worker was at the time of the accident, and would be in the future, under the menace of unemployment.

thereafter money depreciates. In such a situation damages are by no means everywhere confined to interest,⁴¹ and are particularly not so limited in Germany and Austria where the courts labored for so long a time under the terrors of growing inflation. At first the courts would grant depreciation damages to the money-creditor only on proof that had payment been punctual he would have protected the money against such depreciation, either by converting it into a stable foreign currency or in some other manner.⁴² However, in the Germany of 1923, when the mark dwindled to a thousandth, and gradually to a ten-thousandth, a hundred thousandth, a millionth, and finally a trillionth of its value, the courts allowed reasonable damages on the basis that a loss was to be presumed (abstract damages).⁴³

As to mark creditors residing abroad, the German courts, in case of nonpayment, generally awarded depreciation damages on the theory that a foreign creditor would ordinarily have converted the marks into his domestic money.⁴⁴ During

⁴¹ *Supra*, p. 233. Cf. an early North Carolina case where damages as addition to interest were awarded, *Anonymous*, 1 Hayw. (N.C.) 354 (1796), with remarkable annotation.

⁴² *Reichsgericht*, April 8, 1921, *R.G.Z.* 102, 60; September 24, 1921, *J.W.* 1922, 159; Austrian Supreme Court (Assembled Senates) March 8, 1923, 5 *Die Rechtsprechung* 220, and, not quite so strict, June 5, 1925, *ibid.* 1925, 118.

⁴³ *Reichsgericht*, January 29, 1924, *Warneyers Rechtsprechung des Reichsgerichts auf dem Gebiete des Zivilrechts* 1923/24, 104 and many decisions of the Appellate Courts such as Berlin, June 13, 1923, *J.W.* 1923, 940; June 5, 1923 *ibid.* 1923, 940; May 3, 1923, *ibid.* 943; Breslau, July 12, 1923, *ibid.* 946.

However, when the debtor tenders the money due and the creditor refuses to receive it, the risk of depreciation should be considered to shift to the creditor. See German Civil Code 320, par. 2, and Austrian Supreme Court, Dec. 3, 1936, *Entscheidungen*, 1936 no. 202 [in this case only a part of the dollars owed had been tendered, but the Court was probably impressed by the existing difficulties in procuring foreign exchange]. This reasonable limitation of the damage rule, observed as early as the American scaling laws of the 18th century (Hargreaves, *Restoring Currency Standards* [1926] 12) was not taken into account in *The Baarn*, [1933] P. 251 (C.A., 1933), where the debtors had, with the Chilean court's consent, tendered to their Chilean creditors and deposited on their behalf the money with a Chilean Bank. Judicial discussion turned only on the question whether the action taken by the debtors amounted to a payment.

⁴⁴ Judgment of Feb. 20, 1920, *R.G.Z.* 98, 160, adopting this writer's view; Nov. 18, 1924, *ibid.* 109, 281; March 16, 1920, *J.W.* 1920, 704; May 24, 1921, *ibid.* 1921, 1311; similarly, Supreme Court of Czechoslovakia Feb. 27, 1937, *Prager Archiv* 1938, 242 (depreciation of Czech crowns); *contra*: Austrian Supreme Court, Sept. 16, 1924, 6 *Die Rechtsprechung* 214 at 216. The presumption in favor of the foreign cred-

the stabilization and deflation period in Germany, which followed the terrible events of 1923, when the common interest rate rose to giddy heights⁴⁵ the rule of the Code was generally used by the courts to award legal-interest rates considerably in excess of the ordinary legal standard.⁴⁶

The nominalistic rule is likewise not compelling with respect to unliquidated claims other than damages,⁴⁷ and, in some exceptional cases, not even as to liquidated claims. The principal examples are cases of maintenance and kindred claims for the supply of a definite quantity of purchasing

itor also appears in Swiss Federal Tribunal, April 10, 1922, 11 *Die Praxis des Bundesgerichts* 209.

The problem has become much more accentuated through the depreciation of the "blocked" marks, lire, etc. to which the rights of the foreign creditors practically are cut down under the system of exchange control (*infra*, sec. 37). If in such a case the debtor delays payment, and the "blocked" amounts depreciate, the debtor, under the rules described should be held liable for damages though "free" amounts would not have depreciated. However, pertinent cases have not been reported, as yet.

⁴⁵ See *supra*, p. 247.

⁴⁶ Thus the Appellate Court of Berlin (*Kammergericht*), by judgment of March 21, 1929, J.W. 1929, 2164, awarded the following delay-interest rates: 12% for 1925, 9% for 1926, 7% for the following time. For further references, see 2 Staudinger, *Kommentar zum Buergerlichen Gesetzbuch* (9th ed., 1930) 357.

⁴⁷ This principle has been applied under the German law to claims for recoupment of "unjust enrichment". *Reichsgericht*, Oct. 4, 1926, R.G.Z. 114, 342 at 344; *Reichsgericht*, Oct. 11, 1927, R.G.Z. 118, 185 at 188. The same rule was employed by the German-Belgian Mixed Arbitral Tribunal, June 11, 1923, 3 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 291, and by the Roumanian-German Mixed Arbitral Tribunal, March 31, 1927, 7 *ibid.* 738. *Contra*: Austrian Supreme Court, Mar. 10, 1926, *Die Rechtsprechung*, 1926, 74.

In rural leases cattle are frequently given to the lessee under the agreement that at the expiration of the contract the lessee shall restore to the lessor cattle of the same value as estimated in the contract, any deficiency to be paid in cash (*Baux à Cheptel*, in German "Iron-Cattle" contracts, because an invariable stock of cattle has to be restored). When through the inflation the nominal prices for cattle soared, the question arose whether the value envisaged by the contract was the nominal amount of the estimate, or the value of such cattle as were worth that amount at the time of the estimate. The French *Cour de Cassation* held for the lessee, extending the nominalistic principle to the prefixed valuation and rejecting the theory of *imprévision* (*infra*, p. 264) in its judgment of June 6, 1921, D.P. 1921 I 73 and other cases cited in Hubrecht, *op. cit. supra*, p. 249, n. 1, at 117; see 2 Planiol, *Traité Élémentaire du Droit Civil* (11th ed., 1935), no. 1820 bis. *Contra*: Italian Court of Cassation, Judgments of Oct. 6, 1925; Sept. 26, 1925; Dec. 17, 1925; *Corte di Cassazione*, 1926, 38, 40, 1115; also Judgment of May 12, 1927, *Corte di Cassazione* 1927, 1272. The *Reichsgericht* first decided in favor of the lessee (Judgment of Feb. 13, 1920, 75 *Seufferts Archiv* 267); however, the *Reichsgericht* on June 27, 1922, R.G.Z. 104, 394, decided in favor of the lessor, following the trend towards revaluation. The latter case as well as the Italian cases led to an arbitrary handling of valuation and payments involved.

power to the obligee. Those claims may fall into the "unliquidated" category. But even if they are liquidated by agreement of the parties,⁴⁸ they may still be open to judicial reformation where serious change in purchasing power would destroy (or unreasonably raise)⁴⁹ the guaranteed standard of living. Bequests of certain sums, too, may be subject to reformation in the case of a heavy depreciation of the money if necessary in order to comply with the true intent of the testator.⁵⁰

⁴⁸ We do not consider liquidation by judgment. The procedural law of the forum would come in on this score.

⁴⁹ *Reichsgericht*, May 26, 1921, *J.W.* 1921, 1080; *Reichsgericht*, Jan. 26, 1923, *R.G.Z.* 106, 233. The same principle was acknowledged by the Austrian Supreme Court, April 20, 1926, *Die Rechtsprechung*, 1926, 135, and by the Supreme Court of Czechoslovakia, see Wahle, *op. cit. supra*, n. 1, at 169, n. 3, although these courts are opposed to the revaluation of debts. Adaptability, at least, of familial maintenance claims, including liquidated ones, is recognized also by Italian writers. Ascarelli, "*Währungsrechtliche Fragen in der italienischen Rechtsprechung*", *Z.A.I.P.* 1928, 793 at 801; Scaduto, *Debiti Pecuniari e il De-prezzamento Monetario* (1924) 192. Ascarelli calls the above theory "doubtless", without, however, citing decisions.

Because of the necessity of maintaining insurance reserves, life insurance debts and annuities, to be paid by insurance companies, are business transactions which must be calculated on strict mathematical principles. They are not adaptable like familial maintenance rights. *Contra*: Austrian Supreme Court, April 20, 1926, *supra*. Under German revaluation law a partial reestablishment of life insurance claims was provided by a decree of August 28, 1924, *R.G. Bl.* 1924 I 694. Annuities being part of a purchase price of real estate will not be lowered because of an increase in the purchasing power of money. *Reichsgericht*, April 11, 1938, *J.W.*, 1938, 2135.

⁵⁰ The adjudication, of course, will depend on the circumstances. A German resident of Switzerland who died in 1918 had bequeathed 50,000 marks in 1917 to the University of Heidelberg. When the mark had depreciated to one-thousandth, the Swiss Federal Tribunal, April 26, 1923, *Antliche Sammlung* 49 II 12, refused to adapt the legacy to the new situation. *Contra*: *Matter of Martha Lendle*, 250 N.Y. 502, 166 N.E. 182 (1929). The New York Court of Appeals allowed the mark-legatee the nominal amount in reichsmarks although the will was made in 1920 when the mark had already considerably depreciated. The Court erroneously took the new German monetary unit, called by the court "mark" instead of "reichsmark", for a new "reestablished" mark unaware that mark debts had been recast into reichsmark debts at a ratio of one trillion to one. *Infra*, p. 280, n. 62. The mistake cost the estate \$105,355, or at least a considerable part thereof. *In re Illfelder's Estate*, 136 Misc. 430, 240 N.Y. Supp. 413 (1930), *aff'd* 232 App. Div. 740, 249 N.Y. Supp. 903 (1931), on a somewhat different set of facts, a mark-for-mark rule was accurately applied to an American mark legacy paid over to the legatee in 1924.

In *Willings' Estate*, 288 Pa. 337, 135 Atl. 751 (1927), the court construed a bequest of 10,000 francs made in 1896 by an American in France to mean gold francs. This solution is arguable.

III. *Limits of Adaptability*

As suggested by the examples given, the courts will take cognizance of only very serious changes in the purchasing power of the monetary unit.⁵¹ This qualification is applicable to all "adaptable" claims⁵² including damages. Obviously it would be highly unsound policy, even within the limited field of "adaptable" debts, to make claims mathematical "functions" of purchasing power. A legal tie-up of important groups of claims with the fluctuating purchasing power of money will be workable only for relatively short emergency periods.⁵³ There are also political reasons which obviate an immediate transposition of such changes into legal terms. In times of monetary crisis, it would be dangerous for courts officially to admit a depreciation of the monetary unit of the country. This may engender disastrous effects. In war times and in other chaotic circumstances, the question may even involve something like a national shibboleth. In 1811 when English bank notes were at a discount of about 15 per cent, the House of Commons, on the motion of Mr. Vansittart, resolved that the notes "have hitherto been, and are at this time, held in public estimation to be equivalent to the legal coin of the realm, and generally accepted as such . . ." ⁵⁴ Lord Canning felt that such a pronouncement was "carrying the license of exaggeration beyond pardonable limits, and defeating its purpose by the grossness of the caricature".⁵⁵ Yet the resolution was passed by 76 to 24 votes.⁵⁶

On the whole, therefore, it is quite understandable that thus far only a few jurisdictions have deemed it necessary to

⁵¹ This is not true, however, where the obligation calls for the payment of a market price of a definite commodity. The movement of the market price may reflect even minor changes in the purchasing power of money.

⁵² In *Das Geld* (1925), the writer suggested the term *Wertschuld* ("value-debt") which was adopted by the *Reichsgericht*, Oct. 4, 1926, *R.G.Z.* 114, 342. See *Reichsgericht* July 5, 1928, 6 *Zeller Aufwertungs-fälle vom Reichsgericht*, no. 1314; Nov. 28, 1930, *R.G.Z.* 130, 367. In English the term "value-debt" would probably appear out of place.

⁵³ On index clauses, see *infra*, p. 406.

⁵⁴ See debates of the House of Commons on the Report of the Bullion Committee, May 7-15, 1811 in Hansard, *Parliamentary Debates*, vols. 19, 20.

⁵⁵ 19 Hansard 1118.

⁵⁶ 20 Hansard 171.

recognize a group of "adaptable" debts.⁵⁷ The nominalistic principle has been extended to unliquidated debts even in countries such as France and Italy, which, after the World War, experienced depreciations definitely reducing the monetary unit to a fraction of its original value. And, following the reestablishment of the German currency in 1924, the *Reichsgericht*, ardent champion of the general revaluation of mark debts, refused to indemnify the owner of expropriated land for a loss in purchasing power of the new "reichsmark". Germany was then on the gold standard and the court was certainly correct in asserting that if gold is the legal standard of the currency, fluctuations of the gold value as such must not be taken into account by the courts.⁵⁸

IV. *Executory Contracts*

Hitherto we have been concerned only with the repercussion of fluctuating currencies on pecuniary obligations, severing them, in the case of a contract, from other contractual obligations. However, in bilateral contracts, as long as they are executory, a monetary problem arises with regard to obligations for the future delivery of goods or services. Is the obligor liable to performance according to the terms of the contract if, after its conclusion, the currency stipulated for depreciates considerably, at the same time enhancing wages, prices of raw material and other elements of performance? The problem is particularly significant in connection with construction contracts and leases obligating the lessor to supply the tenant with gas, electricity or heat for the stipulated term. Under the nominalistic theory, there is a duty to perform the obligation in return for currency of the decreased purchasing power. However, the situation differs somewhat from the case of a simple debt. Imposing a loss, through depreciation, upon a money creditor is one thing; compelling the obligor to deliver his goods or services for a consideration which has become only a fraction of what it was before is

⁵⁷ The notion of adaptable debts (*Wertschulden*) is especially objected to by Hubrecht, *op. cit. supra*, p. 249, n. 1, at 242, for the obviously fallacious reason that "all debts are value debts". *Contra*: Ascarelli, *Z.A.I.P.* 1928, 783 at 800.

⁵⁸ *Reichsgericht*, Nov. 28, 1930, *R.G.Z.* 130, 367, depicting revaluation as an abandonment of the rule "paper-mark for gold-mark" rather than of the rule "mark for mark". This formula, though questionable, reveals the court's consciousness of the nominalistic principle.

another thing. Courts, apart from any revaluation doctrine, are sometimes apt to treat these two problems differently; namely, to grant relief in the latter situation even though they refuse it in the first. For instance, in 1854, a lessee of premises in Washington, D. C., was given a ten-year option to purchase the premises at a fixed amount. In April, 1864, when the dollar had depreciated more than forty per cent, the lessee exercised the option. The United States Supreme Court, in *Willard v. Tayloe*,⁵⁹ refused to grant him specific performance against the lessor on the ground that it would be "inequitable to compel a transfer of the property for notes, worth when tendered in the market only a little more than one-half of the stipulated price".⁶⁰ The Court held that the plaintiff should have tendered gold or silver coin. Although this view certainly suggests the attitude which was soon to be revealed in *Hepburn v. Griswold*,⁶¹ the line of argument and the unanimity of the Court in *Willard v. Tayloe* place it beyond doubt that the theory of the latter case is independent of the ruling on the unconstitutionality of the greenbacks. The reasoning of *Willard v. Tayloe* is not very forceful⁶² except for its broad development of an equitable specific performance doctrine. After the reversal of the *Legal Tender* cases,⁶³ *Willard v. Tayloe* was disregarded by an Ohio court.⁶⁴ Even if this be error, the practical significance of the decision seems to be very slight, at least if full damages calculated on the basis of the inflated currency are to be awarded to the vendee.⁶⁵ Still the case offers an interesting contribution to the legal theory of executory contracts during an inflationary period.

Another instance may be taken from Austrian law. In the case of an executory sale of goods, the Austrian Supreme

⁵⁹ 8 Wall. (75 U.S.) 557 (1869), which is thoroughly analyzed by Dawson and Cooper, *supra*, p. 256, n. 33, at 863.

⁶⁰ *Willard v. Tayloe*, 8 Wall. (75 U.S.) 557 at 574 (1869).

⁶¹ 8 Wall. (75 U.S.) 603 (1869). *Supra*, p. 203.

⁶² *Humphrey v. Clement*, 44 Ill. 299 (1867), and other cases cited by Dawson and Cooper, *supra*, at 866, n. 189, held to the contrary.

There is, however, an early precursor of *Willard v. Tayloe* in *Meaux v. Helm*, 2 Ky. 252 (1803). In 1781, land then belonging to Virginia had been sold for Virginia pounds which afterwards depreciated. The vendee was denied specific performance for conveyance of the land but the Court took into account, among other equitable grounds, that the vendee had delayed performance of his part of the contract.

⁶³ *Supra*, p. 204.

⁶⁴ *Longworth v. Mitchell*, 26 Ohio St. 334 (1875).

⁶⁵ See *supra*, p. 256.

Court gave the seller relief against the purchaser who, without technical default, had not forthwith tendered the purchase price. The court held on equitable grounds that the purchaser must bear the risk of subsequent depreciation.⁶⁶

However, the doctrine most often invoked in continental countries is the frequently resurrected and variously renamed rule of "*clausula rebus sic stantibus*", which had grown up in the middle ages and disappeared in the seventeenth and eighteenth centuries.⁶⁷ According to this ancient rule, a tacit clause was generally read into contracts to the effect that the binding effect of the contract depends on the continuance of the basic conditions existing at the time of contracting. This doctrine was used by the German courts in the preliminary phase of the revaluation movement as a ground for rescission of executory contracts.⁶⁸ It was cautiously employed in Switzerland where it is expressly recognized by statute, in connection with "work contracts" (e.g., construction contracts).⁶⁹ In France the rule was applied in administrative law,⁷⁰ where it was named the theory of *imprévision* in order to emphasize the "unforeseeability" of the events set forth as a defense. However, suggestions by French writers for an extension of

⁶⁶ Judgment of Dec. 5, 1925, *Die Rechtsprechung*, 1926, 35.

⁶⁷ Hubrecht, *op. cit. supra*, p. 249, n. 1, at 219; Ripert, *La Règle Morale dans les Obligations Civiles* (3rd ed., 1935), no. 82; Krückmann, "*Clausula Rebus Sic Stantibus*, Kriegsklausel, Streikklausel", (1918) 116 *Archiv für Zivilistische Praxis* 157; Osti, "*La cosiddetta clausula 'Rebus Sic Stantibus' nel suo sviluppo storico*", (1912) 4 *Rivista di Diritto Civile* 1. For further references, see 2 Planiol, *op. cit. supra*, p. 259, n. 47, at n. 1168.

⁶⁸ *Infra*, p. 264. A similar though somewhat confused doctrine was used by Polish Courts. See Przybyłowski, *Zeitschrift für Ostrecht* 1929, 169.

⁶⁹ The Swiss Code of Obligations, art. 373, in its first paragraph provides that the contractor in case his expenses or labor were greater than foreseen is not entitled to an increase in the compensation contracted for, but art. 373, par. 2, then goes on to prescribe: "If completion is prevented or is made too difficult through extraordinary and unforeseeable events or through events which were excluded under the presuppositions made by both parties, the court, in its discretion, may award an augmentation of the price or rescission of the contract." In the post-war period the rule was extended somewhat to other types of contracts in case enforcement of the contract would result in the financial ruin of the obligor. Swiss Federal Tribunal, July 1, 1924, *Amtliche Sammlung* 50 II 256 at 264; April 8, 1930, *id.* 56 II 189 at 194. See Siegwart, "*Der Einfluss veränderter Verhältnisse auf laufende Verträge*" in *Festgabe der Juristischen Facultät der Universität Freiburg zur 59. Jahresversammlung des Schweizerischen Juristenvereins* (1924) 77. The "ruin" rule was taken from German law, *infra*, p. 272.

⁷⁰ See *infra*, p. 266, n. 77.

the *imprévision* theory to private contracts⁷¹ were rejected by the French⁷² and, after some hesitation, by the Italian courts.⁷³ There are other cases following a similar policy.⁷⁴

As a matter of fact, it is the function of the legislature rather than of the judiciary to prepare emergency regulations for the adjustment of pending private contracts to changed monetary conditions. Such emergency legislation may, however, confer upon courts or judicial agencies discretionary power within definite limits to rescind unduly burdensome contracts and to grant equitable relief to the party adversely affected by the rescission.⁷⁵ Sometimes legislative authorization will include power to reform contracts and, particularly, to increase rents or other dues with an eye to the depreciation of the currency.⁷⁶ This, then, would amount to revaluation.

⁷¹ Particularly by Ripert, *op. cit. supra*, n. 67.

⁷² The leading case is Appellate Court of Paris, Dec. 21, 1916, *D.P.* 1917 II 33. An annotation by Professor Capitant offers a full discussion of the development of the French law on the problem before us.

⁷³ Italian Court of Cassation, April 7, 1923, *Giurisprudenza Italiana*, 1923 I 458; Jan. 26, 1924, *ibid.* 1924 I 156; April 26, 1928, *ibid.* 1926 I 1128; April 30, 1926, *ibid.* 1926 I 1130. The Italian form for the theory rejected is *presupposizione*, leaning probably on the German *Geschäftsgrundlage*, *infra*, p. 272 at n. 13.

⁷⁴ In Court of Arnheim, Feb. 22, 1937, *Nederland'sche Jurisprudentie* 1937, 1399, the vendor's rescission of an executory contract of sale on the ground of the devaluation of the guilder after the making of the contract was disallowed. The court even held inapplicable a "crisis clause" according to which any "burdens" subsequently laid upon the seller's turnover would be at the charge of the buyer.

A case decided in 1921 by the Supreme Court of South Australia, though resting entirely on an interpretation of contractual clauses, is similar in effect. The contract, couched in terms of English currency was cancelled by the seller after the fall of the English pound during the war; he having the right to cancel "in the event of war affecting this contract". The Court held the cancellation bad because the contract imposed upon the buyer a 2½ per cent extra charge "to cover exchange and conversion", thereby settling the effects of rate of exchange fluctuations. *Rosenfeld and Co. (Pty) Ltd. v. Cowell Bros. and Co. Ltd.*, [1921] South Australia State Rep. 13. See also Appellate Court of Douai, *infra*, sec. 28 n. 28.

⁷⁵ *E.g.*, the French *Loi Failliot* of Jan. 21, 1918, *D.P.* 1918 IV 261, as amended by law of May 9, 1920, *ibid.* 1920 IV 85, regarding executory pre-war contracts. On the highly arbitrary German legislation of 1918-1921, see Nussbaum, *Das Deutsche Wirtschaftsrecht* (2d ed., 1922) 35. Touching Italian emergency legislation, Scaduto, *Debiti Pecuniari e il Deprezzamento Monetario* (1924) 138. Similar Belgian legislation of Oct. 11, 1919, *Recueil des Lois*, 1919, 1678, is mentioned in 2 Planiol, *op. cit. supra*, p. 259, n. 47, at no. 1168 *ter*.

⁷⁶ This way was chosen particularly in regard to lease contracts. As to the pertinent French legislation, see 2 Planiol, *op. cit.*, no. 1706 *bis*-1706 *quar*. On German law, see 2 Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch II* (9th ed., 1928) 347, 612. All these enactments are subject to frequent changes.

V. The Public Utilities Situation

The rates for the supply of water, gas, electricity, railway fares, and the like, may be influenced by a depreciation of money, and generally by changes in its purchasing power. However, the legal type of regulation to take care of these changes varies. In Germany the regulation of this situation has always been considered a matter for the executive branch of the government, particularly for the city government, with no judicial interference whatsoever. In France, the administrative courts possess jurisdiction over this subject matter. In a controversy involving the City of Bordeaux Gas Company, the *Conseil d'État*, the highest administrative court of France, first applied the theory of *imprévision* to major monetary changes, awarding an increase in rates to the company, on account of the inflationary rise of wages and prices.⁷⁷ Judicially, this meant a reformation of a public law contract in an effort to maintain the public service.⁷⁸

In the United States, public utility rate regulation is within the province of public service commissions, whose determinations are subject to judicial review.⁷⁹ The courts are much concerned with protecting the rights of investors from what the courts call confiscation.⁸⁰ In 1898, when the leading case of *Smyth v. Ames*⁸¹ was decided by the Supreme Court, prices, due to the prolonged after effects of the panic of 1893, were considerably below the level of the preceding decades when most of the utilities were built. The public, therefore,

⁷⁷ Judgment of March 30, 1916, D.P. 1916 III 25. Other cases are cited in 6 Planiol and Ripert, *Traité Pratique du Droit Civil* (1930) 548, n. 1.

⁷⁸ In Italy revision of prices in contracts for public work was set by decree of July 21, 1927, no. 1316, *Raccolta Ufficiale* 1927 III 3386, transformed into statute by law of June 14, 1928, no. 1575, *Raccolta Ufficiale* 1928 III 2594.

⁷⁹ The power of the boards was upheld as valid delegation of legislative power. *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307 (1886). The due process clause of the Fourteenth Amendment served as a basis for judicial interference. *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418 at 458 (1890); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894); *St. Louis & San Francisco Ry. v. Gill*, 156 U.S. 649 (1895).

⁸⁰ See Hale, "What is a 'Confiscatory' Rate?", (1935) 35 Col. L. Rev. 1045. For a more general discussion, see Bauer, *Effective Regulation of Public Utilities* (1925); Jones and Bigham, *Principles of Public Utilities* (1931); Mosher and Crawford, *Public Utility Regulation* (1933); Graham, *Public Utility Valuation* (1934) [with ample references].

⁸¹ 169 U.S. 466 (1898).

urged that the reproduction cost rather than the higher original cost of construction be taken as the basis of rate regulation. The Court held that the basis for computing rates to be charged by the utility "must be the fair value of the property being used by it for the convenience of the public", a theory commonly referred to as a "fair return on a fair value". As to "fair value", the Court pointed out that the original cost of construction, the amount expended in improvements, "the present as compared with the original cost of construction . . . are all matters for consideration". This formula, an attempt to reconcile the demands of the public with those of the utilities, left a broad leeway to the public service commissions. When in the following years, prices rose, driving reproduction cost above original cost, the commissions began to have recourse to original cost, abandoning the reproduction cost theory with its hypothetical estimates.⁸² This procedure, however, was held unconstitutional in *Southwestern Bell Telephone Co. v. Missouri Public Service Commission*.⁸³ The "reproduction cost" element thus prevailed; but since this practice was retained after a higher purchasing power of the dollar was restored,⁸⁴ it operated to give the public utilities a lower rate base.

The doctrine thus established links the public utilities, as to their rate bases, to the effects of the fluctuating purchasing power of the dollar, with a view to securing to them a certain stability in terms of purchasing power.⁸⁵ In this connection, the use of index numbers in translating the

⁸² *Denver v. Denver Union Water Co.*, 246 U.S. 178 (1918); *Consolidated Gas Co. v. Newton*, 267 Fed. 231 (D.C.S.D.N.Y., 1920).

⁸³ 262 U.S. 276 (1923).

⁸⁴ *Bluefield Water Works v. West Virginia Pub. Serv. Comm.*, 262 U.S. 679 (1923); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400 (1926); *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159 (1929). See also cases cited, during the depression following the 1929 disaster, in Lilienthal, "Regulation of Public Utilities During the Depression", (1933) 46 *Harv. L.R.* 745.

⁸⁵ In *Consolidated Gas Co. v. Newton*, 267 Fed. 231 at 257 (D.C. S.D.N.Y., 1920), Learned Hand, J., describes at some length how the reproduction cost rule by hitching up the public utility rates with the general price level protects the utilities against changes in the monetary value. See also Goddard, "The Interest of Public Utility Ratepayers in Depreciation", (1935) 48 *Harv. L.R.* 721; Herrman, "Public Utility Valuation and the Depreciated Dollar", (1935) 5 *John Marshall L.J.* 17; "Note" (1933) 17 *Marq. L.R.* 141. Under the former state railway regulation it had been held that a two-cent fare awarded by state law refers, in the case of dollar depreciation, to the depreciated money. *Lewis v. New York Central Ry.*, 49 Barb. (N.Y.) 330 (1867).

purchasing power of the dollar of one year into that of another has found favor with commissions, courts, and advocates of the reproduction cost as a convenient means for avoiding the cost and delay of other methods.⁸⁶ The purchasing power of the dollar has thereby become a significant factor in the law of public utilities, constituting probably one of the most important instances of the legal use of the purchasing-power concept.

As to the "fair return", the rule was established by the Supreme Court that "a public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures".⁸⁷ This return obviously will depend on the capital market rather than on the money market.

⁸⁶ In *Indianapolis Water Co. v. McCart*, 89 F.(2d) 522 (C.C.A. 7th, 1937), *aff'd* 302 U.S. 419 (1938), the Wholesale Commodities Price Index of the U. S. Department of Labor in addition to a private index referred to by the parties was used by the Court practically to award the water works a 25 per cent increase in the rate base as of Nov., 1935, over the rate base as of April 1, 1933. On the other hand, the use of index-numbers was discouraged by *West v. Chesapeake and Potomac Telephone Co.*, 295 U.S. 662 at 669 (1935). A state commission had started from original cost which it translated into an amount of equal purchasing power as of the time of the decree by means of price indices. For this purpose the commission had selected sixteen commodity price indices, had weighted them and derived from them a "fair value" index which was applied to the original cost. This very elaborate and careful proceeding was held unconstitutional by a divided court, partly because the reasons for weighting the indices had not been disclosed by the court. The dissenting opinion, in which Justices Brandeis and Cardozo concurred, was written by Justice Stone. See also *Graham, op. cit. supra*, n. 80, at 21; Dorety, "The function of reproduction cost in public utility valuation and rate making", (1923) 37 *Harv. L.R.* 173 at 190-191. Courts may resort to official index numbers only if they are introduced in evidence, except perhaps for general price trends. *Ohio Bell Tel. Co. v. Public Util. Comm.*, 301 U.S. 292 (1937).

⁸⁷ *Bluefield Water Works v. West Va. Pub. Serv. Comm.*, 262 U.S. 679, 692 (1923).

SECTION 23

REVALUATION IN GERMANY

I. *General Remarks: Preliminary Phases*

"The depreciation of the mark of 1914-1923", says the London economist, Professor Robbins, "is one of the outstanding episodes in the history of the twentieth century. Not only by reason of its magnitude but also by reason of its effects, it looms large on our horizon. It was the most colossal thing of its kind in history; and next to the Great War itself, it must bear responsibility, for many of the political and economic difficulties of our generation. It destroyed the wealth of the more solid elements in German society, and it left behind a moral and economic disequilibrium, apt breeding ground for the disasters which have followed".¹

Such is indeed the background against which the "revaluation" (*Aufwertung*) of the destroyed mark debts has to be viewed. True, revaluation which may be broadly defined as restoration, entire or partial, of debts impaired by monetary depreciation has a history that goes back for centuries.² Still, the legal and economic sciences did not become aware of this fundamental concept and its implications until the German post-war revaluation. Like the catastrophic inflation it was designed to counteract, revaluation was itself an historic event of the first magnitude, probably the greatest which has ever occurred in the history of the law of contracts. Any discussion, legal or economic, directed towards the development of theoretical views on revaluation, must take account of German events.³

¹ See Foreword to Bresciani-Turroni, *op. cit. supra*, p. 255, n. 31.

² *Infra*, p. 284.

³ For information, see commentators on the revaluation law, cited *infra*, p. 280, n. 62. The only analytical history of the revaluation movement and a valuable one has been written by an American. Dawson, "Effects of Inflation on Private Contracts: Germany, 1914-1924", (1934) 33 *Mich. L.R.* 171. For a critical interpretation of the revaluation movement, see Klang, *Geldentwertung und Juristische Methode* (1925); Nussbaum, *Bilanz der Aufwertungstheorie* (1927); Jastrow, *Prinzipienfragen in den Aufwertungsdebatten* (1937). Annual reports, concerning cases and writings, are to be found, since 1924, in *Jahrbuch des Deutschen Rechts*. Ample literary material, on the whole without any lasting interest, is collected in 2 Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (9th ed., 1930) 49, 55, 59.

The inflationary movement began during the war; in June, 1918, the dollar (parity 4.21 marks) had reached a level of 5.31 and by November, 1918, 7.43.⁴ In December, 1919, the dollar was quoted at 46.77; in December, 1920, at 73; in December, 1921, at 191; in July, 1922, at 493; in October, 1922, at 3180; in December, 1922, at 7589. On January 11, 1923, French and Belgian troops occupied the Ruhr territory, center of Germany's heavy industry, in pursuance of Mr. Poincaré's policy of "productive pledges". At once a monetary tornado broke loose: dollar quotations in January, 1923, averaged 17,-972; in February, 27,918; in March, 21,190; in April, 24,457; in May, 47,670; in June, 109,996; in July, 353,412. Then the dollar quotations soared to astronomical heights: 4.6 millions in August; 150 millions on September 18; 1.2 billion on October 9; 12 billions on October 19; the trillion limit was attained on November 14; on November 15 the newly created *Rentenbank* circulated the *Rentenmark* to be tied up to the dollar, but it was at once caught in the tempest. On November 23, the level of 4.2 trillions was reached; but the government in a last effort kept quotations of the dollar down to this level; it did not loosen its grip; the tornado subsided suddenly,⁵ to be followed by the murderous calm of strangling deflation.⁶

Judicial counter-movement to this havoc started in the field of pre-war executory contracts. It set in as early as the war under the pressure of the Allied Powers' blockade. When sellers of foreign material or of goods containing such

⁴ The most detailed tables of the depreciation of the mark in terms of foreign currencies are the *Valuta-Tabellen 1914-1927* (Frankfurter Societäts-Druckerei, 1927). Statistical material as to the depreciation of the mark is contained in Bresciani-Turroni, *op. cit. supra*, p. 255, n. 31; Elster, *Von der Mark zur Reichsmark* (1928) [dollar quotations at p. 433]; Graham, *Exchange Prices, and Production in Hyper-Inflation Germany 1920-1923* (1930). The dollar quotations do not exactly reflect the purchasing power of the mark, which after the war exceeded the respective dollar value. However, the dollar movement roughly gives a true picture of the mark development, and it was of the greatest psychological significance. It was followed tensely and apprehensively by practically the whole populace.

⁵ As to the history of the critical days, see Baumgartner, *Le Rentenmark* (2d ed., 1925); Elster, *op. cit. supra*, n. 4, at 253; Graham, *op. cit. ibid.*; Schacht, *Stabilization of the Mark* (1927) 90. In *Re Illfelder's Estate*, 136 Misc. 430, 240 N.Y. Supp. 413 (1930), *aff'd* 232 App. Div. 740, 249 N.Y. Supp. 903, some misleading statements regarding the rentenmark are given. The latter was created as early as Nov., 1923, and was never made legal tender.

⁶ See Bresciani-Turroni, *op. cit.*, 359.

material refused delivery, alleging impossibility of performance, the question arose whether there was really an "impossibility" or merely a temporary hindrance of performance. The *Reichsgericht* held for the sellers on the ground that inability to send the material through the blockade was to be treated in law as a permanent impediment, considering its long duration and the uncertainty—extreme indeed—of its termination.⁷ This doctrine, very cautiously qualified by the court,⁸ constituted merely an application of well settled rules, and was open to adverse criticism only in respect to the formula subsidiarily employed by the court, according to which the performance promised (*e.g.*, the delivery of copper wire) had become, by force of events, an "economically different" one.⁹

This subsidiary formula, however, paved the way for the next phase of the development. There was submitted to the *Reichsgericht* a contract made in August, 1916, providing for the construction of a tug-boat to be delivered not earlier than fourteen months after the conclusion of peace. The constructor alleged that performance would drive him into bankruptcy since the expenditure for material and wages would triple the contractual price. No pre-war contract, no blockade, no nationalization of material could successfully be pleaded in this case. The court, however, on December 2, 1919, in finding for the constructor, pointed out that under the alleged conditions the performances demanded would be essentially different from the performance contracted for.¹⁰ This was still reasoning in terms of impossibility. However, it was in fact the *clausula rebus sic stantibus* doctrine,¹¹ which was the basis for the decision. Before long, the court, under pressure of increasing economic troubles, resorted outspokenly to the *clausula* doctrine, which it had previously rejected as contrary to German law,¹² rather than to an "impossibility-of-performance" theory. The term *clausula rebus sic stantibus* later

⁷ *Reichsgericht*, Feb. 4, 1916, *R.G.Z.* 88, 71; March 27, 1917, *R.G.Z.* 90, 102; Oct. 15, 1918, *R.G.Z.* 94, 45.

⁸ *Reichsgericht*, March 21, 1916, *R.G.Z.* 88, 172; Jan. 22, 1918, *R.G.Z.* 92, 87; March 15, 1918, *R.G.Z.* 92, 322.

⁹ See the cases cited *supra*, n. 7.

¹⁰ *Reichsgericht*, Dec. 2, 1919, *R.G.Z.* 98, 18.

¹¹ *Supra*, p. 264.

¹² *Reichsgericht*, Sept. 21, 1920, *R.G.Z.* 100, 129; Feb. 3, 1922, *R.G.Z.* 103, 328.

disappeared; but there still remained the doctrine under which the seller (entrepreneur, constructor, etc.) was entitled to rescind the contract if, subsequent to the time of contracting, the original financial "equivalence" between his performance and the consideration promised was, by the rise in prices, destroyed to such an extent that it was unfair to insist upon performance.¹³ This proposition was derived from the broad rule of the Civil Code (sec. 242) according to which the debtor "is under a duty to carry out his performance as good faith requires taking into account general usage" (*wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*). The Court, however, still made relief depend on the fact that maintenance of the contract would lead to the financial ruin of the obligor,¹⁴ thus preserving a relic of the impossibility doctrine. Finally this qualification was abandoned.¹⁵ The result in 1923 was that in executory contracts the seller (or any other party obligated to deliver goods or services) was held entitled to rescind the contract because of a radical change in the market. This was not an absolute rule, however, but was qualified by a weighing of the surrounding circumstances from the angle of "good faith".¹⁶ Generally the right of rescission was conditioned upon the vendor's offering the vendee an opportunity to concede a reasonable augmentation of the price in order to avert rescission.¹⁷ But there was, in these preliminary phases, no direct compulsion upon the vendee to pay more than the sum promised by him; hence there was no revaluation proper.¹⁸

¹³ *Reichsgericht*, Feb. 3, 1922, *R.G.Z.* 103, 328; Jan. 6, 1923, *R.G.Z.* 106, 7. The doctrinal basis of the theory of the Court had been prepared in legal writing, particularly by Krückmann, *supra*, p. 264, n. 67, and Oertmann, *Die Geschäftsgrundlage* (1921).

¹⁴ See *Reichsgericht*, April 16, 1921, *R.G.Z.* 102, 98 at 100, citing precedents.

¹⁵ *Reichsgericht*, Feb. 3, 1922, *R.G.Z.* 103, 328; March 24, 1922, *R.G.Z.* 104, 218.

¹⁶ *Reichsgericht*, June 7, 1921, *R.G.Z.* 102, 272.

¹⁷ *Reichsgericht*, Feb. 3, 1922, *R.G.Z.* 103, 328 at 333; Sept. 22, 1923, *J.W.* 1923, 984.

¹⁸ In case the vendee should wish to carry on the contract, the court was authorized to determine a reasonable price binding upon the parties. *Reichsgericht*, Sept. 21, 1920, *R.G.Z.* 100, 129. In *Reichsgericht*, Nov. 10, 1923, *R.G.Z.* 107, 151, which presented very special circumstances, determination, by the lower court, of a reasonable rent for an elapsed period was approved. Contrary to Dawson, *supra*, n. 3, at 207, note 116, the decision of the *Reichsgericht*, Sept. 22, 1923, *J.W.* 1923, 984, does not hold that the lower courts were free to fix a reasonable rate and to refuse rescission, in the case of nonacceptance.

II. Judicial Revaluation

The death blow inflicted upon the mark by the Ruhr invasion led to the finale of the monetary catastrophe. Debts worth millions and more had evaporated. Adhering to holdings of lower courts the Fifth Civil Senate of the *Reichsgericht*, through the epochal judgment of November 28, 1923, concerning an ordinary mortgage debt rather than an executory contract, ordered revaluation of debts.¹⁹ Previously the Fifth Senate, by a proceeding not provided by law, had procured the consent of the other Civil Senates.²⁰ It was again the conception of "good faith" to which the court resorted;²¹ and it was given preference over the legal tender rules. These rules having broken down, there was no longer any bar to the crushing superiority of the good faith principle. Previous payments, in depreciated money, were held not to have discharged the debt.²² This led to a revival on a tremendous scale of debts paid off and receipted; and this process was rigorously extended to nullify or override waivers,²³ recognized account balances,²⁴ compromises,²⁵ statutes of limita-

The first two cases reveal the inevitable arbitrariness in the determination of the reasonable price (rent). Consideration by the court of the lessened purchasing power of the mark, in the case of damages and other "adaptable" claims likewise developed within this period, but that was no preliminary phase of revaluation. *Supra*, p. 255.

¹⁹ Since a mortgage was involved the court ostensibly confined its judgment to mortgages, but under the theory announced this reservation had no practical significance.

²⁰ Oertmann, *Die Aufwertungsfrage bei Geldforderungen, Hypotheken und Anleihen* (1924) 40.

²¹ This was the basis of the opinion which in many words offered little substance, and it was the only ground finally adhered to in the course of further development. The court, however, in this first judgment advanced also a "supplementary interpretation" of the intent of the parties who the court points out, would have decided for revaluation in case they had foreseen the depreciation of the mark. This puzzling argument concluding from the intent of the parties what the court had previously put in before was later abandoned by the court as was the reference to sec. 607 of the Civil Code, *supra*, p. 219, n. 34. Heck, (1924) 122 *Archiv für die Civilistische Praxis* 203 at 208, remarks that the court did not mention its previous decisions contrary to the new doctrine, nor pay attention to the public interest involved in the legal tender acts. The question whether revaluation was warranted by the currency situation was not touched upon by the court.

²² *Reichsgericht*, March 13, 1925, *R.G.Z.* 110, 65 at 78; Dec. 3, 1924, *J.W.* 1925, 45, and numerous other cases referred to in 2 Staudinger, *op. cit. supra*, n. 3, at 64.

²³ *Reichsgericht*, May 7, 1927, *R.G.Z.* 116, 313; June 11, 1927, *R.G.Z.* 117, 226.

²⁴ *Reichsgericht*, Oct. 30, 1928, *R.G.Z.* 122, 200 at 206.

²⁵ *Reichsgericht*, June 11, 1927, *R.G.Z.* 117, 226.

tions,²⁶ and judgments.²⁷ In the name of "good faith", retroactivity was driven back through the past as far as 1920.²⁸ Thus, in addition to all existing debts, past debts likewise became the subject of controversy between creditor and debtor with no direction for settlement. For there was no guidance except the broad pronouncement that the solution of the controversy must conform to good faith. Revaluation was not carried out by the German courts along lines comparable with Anglo-American equity, that is by means of definite equitable rules of law; the *Reichsgericht*, consistently with the theory adopted, urged upon the lower courts the view that "revaluation is not a legally definite concept" (*kein rechtlich bestimmter Begriff*)²⁹ and that the judge must decide exclusively with an eye to the individual circumstances of the case, considering "all the interests" of the parties,³⁰ all of the ascertainable facts.³¹ Through this quagmire the paths of *if* and *how much* were to be traced to the goal of revaluation. Sometimes the fact that the price had depreciated to a half or quarter of its former value at the time of contracting was held sufficient justification for revaluation;³² but this did not

²⁶ *Reichsgericht*, June 22, 1925, *R.G.Z.* 111, 147; Nov. 10, 1926, *J.W.* 1927, 983, no. 17.

²⁷ *Reichsgericht*, Dec. 15, 1928, *R.G.Z.* 123, 66, giving references. Administrative decisions were likewise exploded. *Reichsgericht*, Oct. 24, 1928, *R.G.Z.* 122, 167.

²⁸ *Reichsgericht*, Jan. 16, 1926, *R.G.Z.* 112, 324; May 25, 1927, *J.W.* 1927, 1853, no. 33, giving references; Nov. 22, 1927, *J.W.* 1928, 494 [condemnation money paid in 1919], and Dec. 15, 1927, *J.W.* 1928, 158. [The judgment of Nov. 22, 1927, shows that retroaction was extended to "adaptable" debts.] At one time the Second Civil Senate of the *Reichsgericht* made a desperate effort to dam up the flood by setting up August 15, 1922, as a backward limit to retroaction, but this arbitrary demarcation was not approved by the other Senates and was finally abandoned by the Second Senate. So arbitrariness as to retroaction was reestablished, creative of thousands, perhaps hundreds of thousands of controversies. See Nussbaum, *Bilanz der Aufwertungstheorie* (1929) 24; Dawson, *supra*, n. 3, at 236.

²⁹ Thus the important decree of the Assembled Senates (*Plenarbeschluss*) of May 31, 1925, *R.G.Z.* 110, 371. "Objections" (against giving revaluation beyond dollar parity), the court said, "cannot be derived from the concept of revaluation, since revaluation is no legally distinct concept at all." A remarkable confession. In *Kornatzki v. Oppenheimer*, [1937] 4 All E.R. 133 (Ch., 1937), the court felt that German revaluation was a question of "fact" rather than of "discretion". However, revaluation has invariably been the subject of decisions of the *Reichsgericht*, which only decides questions of law.

³⁰ *Reichsgericht*, Nov. 28, 1923, *R.G.Z.* 107, 78; resolution of the Assembled Senates in preceding note.

³¹ *Reichsgericht*, Feb. 21, 1924, *R.G.Z.* 108, 83.

³² Judgment of Oct. 25, 1927, *J.W.* 1928, 159, no. 12; Dec. 6, 1927, *J.W.* 1928, 1384; Jan. 16, 1928, *J.W.* 1928, 1800.

hold good in other cases.³³ Concerning the amount to be awarded, the *Reichsgericht* categorically refused to set up any standard. The lower courts were told to use, at their discretion, singly or in combination, as principal or subsidiary means, the dollar value,³⁴ the index of living cost, and of wholesale prices,³⁵ the market prices of individual goods,³⁶ or a special index privately elaborated by a member of the *Reichsgericht* (Zeiler)³⁷; but none of these measures were to be conclusive.³⁸ Among other facts, the financial situation of the parties was to be considered, on the theory that the impecunious debtor should pay less than the moneyed debtor, and that the wealthy creditor should not be treated as favorably as the poor one.³⁹ For this purpose the financial situation of the parties had to be considered not only with respect to the end of the inflationary period, but also with respect to the subsequent financial fate of the parties.⁴⁰ Thus the parties in ordinary debt litigation were compelled to disclose their financial status and its vicissitudes. To these difficulties of fact were added almost insoluble juridical problems. These originated chiefly in the conflict of laws field,⁴¹ in the necessity of giving the owner of mortgaged real estate recourse against his predecessor upon revaluation of the mortgage,⁴² and finally in the attempts of the *Reichsgericht* to curtail litigation by the development of an estoppel (*Ver-*

³³ According to judgment of Jan. 5, 1925, *J.W.* 1925, 467, revaluation would have to take place where "the stipulated sum of paper money, compared with the value of the consideration received, either is devoid of significance or is of minimum economic value".

³⁴ *Reichsgericht*, Oct. 13, 1925, *R.G.Z.* 111, 375.

³⁵ Judgment of Feb. 8, 1924, *J.W.* 1924, 804; *Reichsgericht*, Nov. 12, 1924, *R.G.Z.* 109, 158; Assembled Senates, May 31, 1925, *R.G.Z.* 110, 371 at 379.

³⁶ Judgment of Jan. 16, 1928, *J.W.* 1928, 1800.

³⁷ Assembled Senates of May 31, 1925, *R.G.Z.* 110, 371 at 379.

³⁸ This has frequently been pointed out. See, e.g., Assembled Senates, May 31, 1925, *R.G.Z.* 110, 371; *Reichsgericht*, Feb. 18, 1927, *R.G.Z.* 115, 201, at 204; June 29, 1926, *J.W.* 1926, 2619, no. 3; Jan. 16, 1928, *J.W.* 1928, 1800.

³⁹ Ordinarily financial circumstances of the debtor were taken into account, but on principle, the situation of the creditor was also to be considered. See, e.g., *Reichsgericht*, May 7, 1927, *R.G.Z.* 116, 313 at 317; Dec. 15, 1927, *J.W.* 1928, 158; April 14, 1928, *J.W.* 1928, 1819.

⁴⁰ *Reichsgericht*, Jan. 15, 1929, *R.G.Z.* 123, 371; Sept. 22, 1928, *J.W.* 1929, 664.

⁴¹ *Infra*, p. 291.

⁴² On the implications of this so-called *Ausgleichsanspruch* (indemnification claim) of the owner, see 2 Staudinger, *op. cit. supra*, p. 269, n. 3, part 3 (1929) at 1668, and the succinct discussion of Flad in *Juristische Rundschau* 1929, 201 at 204.

wirkung) doctrine of an entirely novel kind.⁴³ Stipulations were sometimes inserted in contracts to the effect that the parties subjected themselves to a foreign jurisdiction "in order to escape revaluation".⁴⁴

Some figures may illustrate what has been said. In his budget report of 1926, the Prussian Minister of Finance mentioned that it had been necessary as a result of revaluation to appoint more than three thousand officials, permanent and auxiliary, to the Prussian courts.⁴⁵ A figure of five thousand for all of Germany is probably not an exaggeration. Litigation, as if to imitate depreciation, rose to millions of cases.⁴⁶ Three reporter systems were created for revaluation cases alone;⁴⁷ the *Reichsgericht* itself rendered considerably more than two thousand judgments on revaluation⁴⁸ during a pe-

⁴³ The creditor was held excluded from retroactive revaluation unless he had demanded it within a reasonable time after the retroaction-ruling had become generally known. This had happened, according to various judgments, in 1924, or in 1925, or in 1926, or in 1927. Staudinger, *op. cit.*, at 656; Nussbaum, *op. cit. supra*, p. 269, n. 3, at 38.

⁴⁴ *Reichsgericht*, May 16, 1926, *J.W.* 1926, 1336. The contract was between a German and a foreigner, but the court acknowledged that the German party might also have had an interest in avoiding revaluation.

⁴⁵ Among those appointees there must have been considerably more than a thousand judges. The Prussian "revaluation departments" (see next note) alone were tenanted, on May 1, 1927, by 849 judges which number was reduced, on Jan. 1, 1928, to 442.

⁴⁶ Special revaluation departments (*Aufwertungstellen*) were instituted with the lower courts of general jurisdiction (*Amtsgericht*). Revaluation Law of July 6, 1925, *R.G. Bl.* 1925 I 117, at 130, sec. 69 *et seq.*

They had to adjudicate in a summary proceeding certain controversies turning on the amount and other terms of statutory revaluation. Their main business consisted in adjudicating motions for individual reduction or augmentation of the 25 per cent standard revaluation of mortgages and, later on, in adjudicating motions of mortgagors for the granting of a moratorium. On Jan. 20, 1928, 2,864,217 cases had been brought before the Prussian revaluation departments, 2,773,595 of which were then disposed of, a tremendous achievement of the Prussian judicial bureaucracy. In Bavaria, on December 31, 1927, 98.17 per cent of the revaluation-department cases, totalling 522,656 had been disposed of. Nussbaum, *op. cit. supra*, p. 269, n. 3, at 17. Ordinary revaluation lawsuits, particularly those involving "free revaluation" were dealt with by the ordinary law courts. There are no statistics concerning these but it is certain that up to 1932 they were the most burdensome part of the revaluation business. See *infra*, n. 48 and 49.

⁴⁷ *Die Rechtsprechung in Aufwertungssachen; Die Aufwertungspraxis; Aufwertungsfälle beim Reichsgericht* (edited by Zeiler, member of the *Reichsgericht*, 11 volumes). There were, in addition, an *Aufwertungs-Kartei* using a loose-card system and a more popular weekly, *Die Aufwertung*.

⁴⁸ In Zeiler's reports there were collected under 2327 divisions about 2,000 revaluation judgments of the *Reichsgericht* up to 1930 inclusive. The reports were then discontinued.

riod of about ten years.⁴⁹ Nearly half of them reversed the decisions of the lower appellate courts, thus evidencing the complete bewilderment of the judiciary.⁵⁰

It would be difficult to find in the legal history of the great countries of western civilization a similar instance of such thoroughgoing judicial aberration and confusion. A prominent German lawyer, at the 1925 meeting of the German Lawyers Association, accurately characterized the situation when, "to the tumultuous applause of the audience", he asserted that "the courts, under the revaluation doctrine, are running into the danger of becoming institutions to distribute the goods of life in accordance with ethical points of view".⁵¹ And the Supreme Court of Austria, in rejecting judicial revaluation, stated that its effect consists in making the court's personal notions of equity and its ideas concerning the most intricate general conditions, the law of the land, and that the courts would thereby "lose the ground under their feet".⁵²

The *Reichsgericht* was, however, fortunate in a very important respect. Revaluation obviously presupposes a previous currency reorganization and a restoration of stable money. As mentioned above the new *rentenmark* was issued not earlier than November 15, 1923, and the stabilization level was reached on November 23. But the extreme uncertainty as to the success of the stabilization persisted for several months,⁵³ as reflected by unheard of interest rates.⁵⁴ On November 28, when the *Reichsgericht* handed down its judgment, the soil still trembled, ready to open once again as at the time when the *assignats* of the French Revolution were replaced by the *mandats territoriaux*.⁵⁵ The imminent danger

⁴⁹ The number of revaluation cases decided in 1932 were still considerable, see *Jahrbuch des Deutschen Rechts* for the year 1932 (1933) 313. There are even pertinent cases in the *Jahrbuch* for 1936, at 376; however, the figures since 1933 are no longer comparable, because of the formidable decline of judicial litigation after the establishment of the national-socialist government (a fact, which cannot be developed here, although of considerable interest to political science).

⁵⁰ Zeiler, *Aufwertungsfälle vom Reichsgericht* (1931) (preface to vol. 11).

⁵¹ J.W. 1926, 232, annex p. 14 (Address of Mr. Hoeck of Hamburg). German writers opposed to the doctrine of the *Reichsgericht* are listed in Nussbaum, *op. cit. supra*, p. 289, n. 3, at 8.

⁵² Judgment of March 12, 1930, *Die Rechtsprechung* 1930, 105, referring to the objections to judicial revaluation raised by Nussbaum, *Das Geld* (1925) 125.

⁵³ See Schacht, *op. cit. supra*, p. 270, n. 5, at 151.

⁵⁴ *Supra*, p. 247.

⁵⁵ See Hargreaves, *Restoring Currency Standards* (1926) 34.

and the stabilization problem in general apparently were not taken into account by the court, which never mentioned these points; it seems clear that the court, after deliberations which must have begun a considerable time before November 23,⁵⁶ had made up its mind to start revaluation regardless of stabilization as had been done by some of the lower courts.⁵⁷

III. Statutory Revaluation

The course of the *Reichsgericht* placed the German government in a serious situation. The government was aware that, while the Ruhr invasion and the inflation lasted, there was no chance for successful legislative revaluation. That would have required a carefully defined "recasting" rule in a law creating a new and stable currency. However, the court was about to force a sweeping and economically ill-considered policy on the country, which would thus, in addition to its other troubles, become a judicial battleground. Counteracting legislation was clearly indicated. However, when it became known that the government intended to take counter-measures, the board of the "Association of the Judges at the *Reichsgericht*" on January 8, 1924, protested in a remarkable public declaration.⁵⁸ These high judges declared that the news of the intended legislation had caused them astonishment.⁵⁹ The "good faith" principle on which the decision of November 28, 1923, rests, the declaration asserted, was superior to any "individual statutory rule". The judges warned the govern-

⁵⁶ Considering the previous negotiations by the Fifth Civil Senate with the other Senates, *supra*, p. 273, n. 20.

⁵⁷ Particularly by the Appellate Court of Darmstadt, March 29, 1923, and May 18, 1923, *J.W.* 1923, 459 and 522.

⁵⁸ *Deutsche Richterzeitung*, 1924, 7; *J.W.* 1924, 90. The association was of a private nature, yet doubtless representative of the body of the *Reichsgericht's* judiciary. No objection to the declaration which was signed by Mr. Lobe, President of a Senate of the *Reichsgericht*, was ever voiced by a member of the court. On January 1, 1925, President Lobe published an article, containing strictures upon the government, under the suggestive title "*Der Untergang des Rechtsstaates*" [Decay of the Government by Law] (*Deutsche Juristenzeitung* 1925, 15). However, it was certainly not the democratic government which wrought the end of the government by law; on the contrary, never in German history were the functions and authority of the courts so extended as they were by this government. The entire misappreciation by the high judge of real conditions reveals his bias and passion, and it is important to note that a similar mental attitude prevailed within the judiciary and the non-judicial bureaucracy.

⁵⁹ This is translation of *Befremden* which, however, has a connotation of reserved blame not exactly translatable.

ment that reliance on the planned legislative measures might be rejected by the court as a violation of good faith, and that possibly such legislation in itself might be considered as a violation of good faith, as "immoral", and as unconstitutional, even if the government should forbid revaluation only partially. The court's feeling of responsibility as revealed by the judgment of November 28, 1923,⁶⁰ was contrasted by the justices with the apparent moral insensibility of the government and the apprehension of the declarants that the government might yield to powerful and "selfish" interests.

The declaration is all the more impressive in view of the fact that the German judiciary has always been subordinate to the legislature. In a long and bitter struggle, the epoch of liberalism had secured to the courts independence from the commands of the monarch. However, subordination of the judiciary to *legislation* had evolved as a well-settled rule, consonant with the constitutions of the several states and actually followed without hesitation. There was neither a Chief Justice Marshall nor a due-process clause. On the other hand, the democratic German government of 1924 possessed little authority. Arisen from defeat and revolution, and incessantly humiliated by foreign powers, formers of world opinion, it failed to impress justices educated in the proud tradition of centuries-old monarchic bureaucracy. They were hardly convinced of the continuity or even, perhaps, of the legitimacy of German democratic government.⁶¹ At the same time this government, as required by its principles, not only refrained from interference with the personnel of the court but also felt bound to hearken to the voice of judicial author-

⁶⁰ See, however, *supra*, p. 273, n. 21.

⁶¹ Recently a national-socialist writer, Franzen, *Gesetz und Richter nach den Grundsätzen des Nationalsozialistischen Staates* (1935) 33, states that the course of the *Reichsgericht* was brought about by the Court's "distrust of democratic legislation". He exclaims, however, (at 34) that "such attempts of courts to correct the legislature, are incompatible with the principles of national-socialistic *Führer-state*!" (Exclamation point by Mr. Franzen.) On the other hand, Professor Pergament of Leningrad in *Zeitschrift für Ostrecht*, 1930, 87, hails the "revolutionary" proceeding of the *Reichsgericht*, revolution being the ultimate remedy against unjust and oppressive legislation. But this is probably not the Russian government's theory of the functions of the judiciary.

The political problem of governmental relations here involved is ably discussed by Dessauer, *Recht, Richtertum und Ministerialbürokratie* (1928); and by Grau, *Rechtsprechung oder Gesetzgebung zur Anpassung des Privatrechts an die veränderten Verhältnisse* (1924) 122 *Archiv für die Zivilistische Praxis* 318.

ity. Certainly it did not plainly and simply surrender in face of the threatening declaration of the judges; still, it did not dare to challenge the principle of judicial revaluation, henceforth by legislation called "free" revaluation because it was not put under any definite limits as was "statutory" revaluation. Statutory revaluation was confined, by various enactments and decrees,⁶² to investments and affected particularly mortgages (revaluation rate 25 per cent) and industrial bonds (revaluation rate 15 per cent); mortgage bonds, life insurance, and savings bank accounts were revalued, by appropriate proceedings, to the extent of the reserves held by the debtors for the protection of the holders of such rights.⁶³ For mortgages, by far the most important revaluation item,⁶⁴ retroactive revaluation was expressly allowed, where payment had been made in the period from June 15, 1922, to February 14, 1924, or where the creditor had reserved his

⁶² Legislative revaluation was inaugurated by the Third Emergency Tax Ordinance (*Dritte Steuernotverordnung*) of Feb. 14, 1924, *R.G.Bl.* 1924 I 74. An attempt was made here to keep revaluation within bounds and to use the profits of the real estate owners and of other "disburdened" debtors for taxation purposes with an eye to the necessary balancing of the budget. But this scheme was soon defeated by the revaluation party. The Third Emergency Tax Ordinance was replaced by the Revaluation Law (*Aufwertungsgesetz*) of July 16, 1925, *R.G.Bl.* 1925 I 117, which became the center of a large body of legislation purporting revaluation of investments. The leading commentators of the Revaluation Law are Michaelis, Quassowski, Schlegelberger & Harmening, and Neukirch. More systematic is Mügel, *Das Gesamte Aufwertungsrecht* (5th ed., 1927). These all include pertinent material outside the Revaluation Law proper. For a survey, see 2 Staudinger, *op. cit. supra*, p. 269, n. 3, at 55.

Back of revaluation was the "recasting rule" of the German Coinage Laws of August 30, 1924, *R.G.Bl.* 1924 II 254, sec. 5, par. 2, providing, in accord with the actual level of stabilization (*supra*, p. 270) that in the payment of debts a trillion marks should be equal to a reichsmark (dollar parity 4.2 trillion marks). It has been estimated that 60,000 to 70,000 freight cars, amounting to about 1,000 freight trains, loaded with one mark notes, would have been necessary to pay a reichsmark. Jastrow, *op. cit. supra*, p. 269, n. 3, at 61.

⁶³ This rule developed a considerable importance in the international field. Before the War, several leading American life insurance companies, under a license of the German government, had established German branches which issued their policies on a mark basis. After the collapse of the mark, the insured demanded "free" rather than the limited statutory revaluation which, they claimed, was reserved to German companies. The German courts, however, decided in favor of the American companies. *Reichsgericht*, Dec. 13, 1929, *R.G.Z.* 127, 20; March 10, 1931, *R.G.Z.* 131, 359. The interests involved in the question amounted to more than a hundred million dollars.

⁶⁴ Mortgages on German real estate before the war totaled more than 60 billion marks, amounting to about 20 per cent of the entire national wealth. Nussbaum, *Lehrbuch des Deutschen Hypothekenwesens* (2d ed., 1921) 201.

"rights"; thus rewarding him for his disregard of the legal tender law.⁶⁵ Revalued debts were declared to be gold mark debts in order to protect them (as far as words could) from the influence of another inflation. Special and very limited provision was made for the revaluation of the public debt. Ordinary bank accounts were excluded from revaluation, because they are not secured as are savings bank accounts by revaluable reserves.

Through this legislative system of elaborate restrictions, a comparatively clear and distinct regulation was wrought, which, although limited to investments, considerably narrowed the field of litigation. In this connection it may also be mentioned that the judgment of November 28, 1923, had announced the necessity for distinguishing, in regard to revaluation, between mortgages on agricultural, industrial, and urban real estate, as well as the necessity for considering the various public charges upon real estate, the statutory emergency protection of lessees, etc.—differentiations which were eliminated by the legislature. It is difficult to imagine what the result would have been had the government not succeeded in this respect.⁶⁶

IV. Sociological Aspects

Envisaged from a sociological point of view the revaluation movement was chiefly put through by the middle class which included the upper strata of the bureaucracy, judicial as

⁶⁵ The attitude of American legislatures and courts after the collapse of the continental currency was entirely opposite. "It was decided that the creditors who had refused or evaded payment were not entitled to receive the metallic value of their debts", i.e., they lost the privilege of revaluation. Hargreaves, *op. cit. supra*, n. 55, at 12, 23. In Germany, likewise, the preference given to repudiating creditors had been strongly opposed. Quassowski, *Kommentar zum Aufwertungsgesetz* (5th ed., 1927) 217.

⁶⁶ Attempts were made to challenge statutory limitation of "free revaluation" as unconstitutional. They were rejected by the *Reichsgericht*, March 1, 1924, *R.G.Z.* 107, 370; *Reichsgericht*, Nov. 4, 1925, *R.G.Z.* 111, 320. In the first case the court held justifiable the concern of the government that revaluation would lead "to a multitude of litigation hard to overcome" and would result in long lasting uncertainty and jeopardy to real-estate credit [a mortgage situation was involved in the case]. The court concludes therefrom that legislative intervention was reasonable. Such discernment had appeared neither in the judgment of Nov. 28, 1923, nor in the pronouncement of the judges' association. It implies a belated recognition of the incompetence of the judiciary. The "due-process" language of the court, which had not the slightest basis in the Weimar Constitution of the German Republic, is noteworthy.

well as non-judicial. They felt that they had been unjustly dealt with in the entire destruction of their savings and their inherited fortunes, and saw no chance for even a partial restoration of their standard of living except through revaluation. Workers, peasants, and industrialists then supporting the government⁶⁷ were not interested in revaluation; but the middle class, through the *Reichsgericht*, succeeded in imposing its will upon the government. Partisans of the revaluation doctrine repeatedly sought its justification in a theory of "revolutionary emergency law" (*revolutionäres Notrecht*),⁶⁸ and this phrase was occasionally referred to, without objection, by the *Reichsgericht* itself.⁶⁹ However, an emergency situation does not confer revolutionary powers upon ordinary law courts. On the contrary, it is during just such emergency situations, that the law should be cherished and defended by the courts. The conduct of the *Reichsgericht* in this respect appears in distinct contrast to the procedure of the courts of other countries. Thus, the depreciation of the Austrian crown, of which 1/14,400 was left,⁷⁰ meant practi-

⁶⁷ The industrialist group was represented in the government through the populist party (*Volkspartei*) under the leadership of Stresemann.

⁶⁸ This notion was first advanced by H. Abraham, *Juristische Rundschau*, 1925, 1233, and was adopted by other writers.

⁶⁹ Judgment of Jan. 23, 1926, 80 *Seufferts Archiv* 102. The "revolutionary" violent mood of the *Reichsgericht* burst out when a Danish Court held the German mortgagee of formerly German real estate liable to discharge the Danish owner who had tendered the nominal amount of the debt. The *Reichsgericht* refused to enforce the Danish judgment. The Court pointed out that the judgment was based "on unethical grounds" ("*auf unsittlicher Grundlage*") and that it offered an "ethically wicked argument" ("*es begründe die Forderung in sittlich verwerflicher Weise*"). *Reichsgericht*, June 25, 1926, *R.G.Z.* 114, 171. It would have been entirely unobjectionable to allege that enforcement of the Danish judgment was contrary to German public policy, but the court was in a mood to fight an unintelligent world.

Still more aggressive, of course, were the partisan writings on revaluation. *E.g.*, Professor Stampe, leading sponsor of revaluation (see *supra*, p. 249, n. 2) entitled his review of the present author's book *Das Geld*, "Stricken with Blindness" and intimated that "international big finance" is behind nominalistic developments. The "augurs in London, Paris and New York" would find it hard to suppress their "shouts of joy" on seeing an "honest German scholar" [the present writer] advocating nominalism. *Die Aufwertung*, June 19, 1925. The irrational undercurrent of the revaluation movement comes to light in such utterances.

⁷⁰ This ratio between the Austrian crown and the new Austrian "schilling" was adopted by the law of Dec. 20, 1924, *Bundesgesetzblatt* 1924, No. 461, corresponding to the depreciation of the crown. On the fate of the Austrian crown see van Walré de Bordes, *The Austrian Crown* (1927), particularly tables p. 114.

cally complete expropriation of crown-creditors just as the depreciation of the mark did of mark creditors. And Austria is a German country, with a law which on the whole has developed along lines similar to the law of the German *Reich*. Moreover, Austria had a large middle-class with a particularly broad and deeply rooted bureaucracy. Nor did Austria lack advocates of revaluation.⁷¹ However, the Austrian middle class did not develop such political energy as that demonstrated by corresponding German groups. To be sure, Germany's national economy was based to a much greater extent than the Austrian on a credit substructure, which explains why some revaluation was bound to come after the restabilization of the German monetary system. It is not the fact of German revaluation in itself, but its concomitants and outcome which constitute from a sociological point of view, the characteristic feature of the movement. What happened was a judicial manifestation of the "*disequilibrium*" described by Professor Robbins, an ominous deviation from a great law and a great tradition.⁷²

SECTION 24

REVALUATION IN GENERAL

I. *Scaling Laws. Debts in Continental and Confederate Dollars*

The rational scheme of revaluation, as indicated in the preceding discussion, would be a law reorganizing the na-

⁷¹ Thus the Chief President of the Austrian Supreme Court, Dr. Roller, in his monograph *Geldentwertung, Rechtsprechung und Gesetzgebung* (1924). The most ardent Austrian advocate of revaluation, however, was Wahle. His volume, *Das Valorisationsproblem in der Gesetzgebung und Rechtsprechung Mitteleuropas* (1924), is valuable for its references to Austrian and Czechoslovakian cases and writings. A survey of Austrian legal literature is presented by Nussbaum, *op. cit. supra*, p. 269, n. 3, at 10.

⁷² Kant, in his *Metaphysische Anfangsgründe der Rechtslehre* (1797) XL, discusses the case of a servant who at the end of a year was paid his annual wages in debased coin which would not give him the same purchasing power as the coin had at the time of contracting. Kant decides that *in law* (as distinguished from a non-legal equitable point of view) the servant would not be entitled to relief, in the absence of a contractual provision to the contrary: *a court being without authority to adjudicate a case on undeterminable grounds.*

tional currency and, at the same time, recasting in terms of the new currency debts articulated in terms of the former depreciated currency.¹ Since the recasting is ordinarily done by scaling the debts on a time basis (normally the time of contracting)² the expression, "scaling law", frequently employed in American technical language, seems appropriate. Such laws appear as early as the Middle Ages.³ However, the most famous scaling laws are probably those which were enacted in France following the breakdown of the paper currency of the Great Revolution,⁴ the scaling laws of the several American States after the experience with the Continentals,⁵ the laws adopted after the Civil War by various south-

¹ An effect similar to revaluation of debts may be reached by decreasing the face value of paper money. The colonial legislators did not overlook this attractive device. Fisher, "The Tabular Standard in Massachusetts History", (1913) 27 *Quart. Journ. of Economics* 417, discusses the law enacted in 1742 under Governor Shirley making a novel sort ("new tenor") of bills of credit legal tender. In case of depreciation of these notes, it was provided that judgments should be rendered either in terms of silver or in the bills with due allowance for depreciation. Under a law of 1747, Mass. Laws 1747, c. 1, it was further prescribed that in determining the allowance regard should be had not only to the price of silver and of bills of exchange, but of provisions and other necessities of life. This amounts to a pre-planned revaluation, independent of currency reconstruction. Still the system seems not to have functioned well. Fisher, *supra*, at 426. Furthermore, when Maryland in 1780 decided to exchange continentals held by her citizens at a ratio of 100:3 for new Maryland bills, the legislature provided that in case of depreciation of the new bills, a judicial body should be authorized to fix for certain periods the rate at which the new bills must be taken in payment. Md. Laws 1780, c. 8, sec. 18.

² In this connection, Savigny's "current-value theory" is sometimes referred to by legal writers, *infra*, p. 297.

³ Particularly in France after the 14th Century. Hubrecht, *op. cit. supra*, p. 249, n. 2, at 52; Landry, *Essai Economique sur les Mutations des Monnaies dans l'Ancienne France* (1910). Outstanding was an ordinance of Henry II of Dec. 15, 1421, 11 *Les Ordonnances des Rois de France* 143; Mater, *Traité Juridique de la Monnaie et du Change* (1925) 121.

China had a paper money inflation as early as the beginning of the 12th Century A. D. See, e.g., Carter, *The Invention of Printing in China and Its Spread Westward* (1925) 73, but nothing seems to be known about an ensuing revaluation of debts. There are modern Chinese revaluation judgments: Supreme Court of Peking, May 5, 1924, and April 14, 1926, tr. D.P. 1928 II 93. The Court set forth the view that the loss through depreciation should be halved between debtor and creditor, but this interesting and perhaps wise idea is obfuscated by strange limitations and implications. See the annotation by Professor Escarra, expert on Chinese law, *ibid.*

⁴ Hargreaves, *op. cit. supra*, p. 277, n. 55, at 26; 3 Marion, *Histoire Financière de la France* (1914); Mater, *op. cit.*, at 112; Mater, "La dépréciation du papier-monnaie et ses conséquences juridiques de 1790 à 1800", *Revue du Droit Bancaire*, 1924, pp. 72, 168, 266, 367.

⁵ Hargreaves, *op. cit.*, at 1.

ern states for the regulation of Confederate currency debts,⁶ and the Austrian scaling laws of 1811-1813.⁷ But revaluation may also be achieved by a classification of the transactions involved rather than by appeal to the time of contracting, or these methods may be used in combination. In more recent years scaling by time seems to have fallen into desuetude. The German scheme of revaluation, through equitable judicial case-to-case appraisal of the surrounding circumstances of the contract, was used in Poland and Hungary. The grounds of decision were legislatively prescribed and the limits of decision were much narrower.⁸ No revaluation was pro-

⁶ See Dawson and Cooper, "The Effect of Inflation on Private Contracts: United States, 1861-1879", (1935) 33 *Mich. L. Rev.* 706 at 715, where an amazing multitude of state court decisions has been collected.

⁷ Hargreaves, *op. cit.*, at 73; 1 Winlwarter, *Handbuch der Justiz und Politischen Gesetze* (1829) 3, sec. 13 *et seq.*; Hofmann, "Die Devaluierung des Oesterreichischen Papiergeldes im Jahre 1811", (1923) *Schriften des Vereins für Sozialpolitik*, vol. 165.

Some other instances may briefly be mentioned. The Prussian "Finanzedict" of March 29, 1764, by which Frederick the Great created the new Prussian "thaler", scaled the existing debts according to the time of contracting. 3 *Novum Corpus Constitutionum Prussico-Brandenburgensium* 381, sec. 10; 3 v. Schrötter *Preussisches Münzwesen im 18 Jahrhundert* (1910) 199. Again, when Denmark by decrees of Jan. 5 and 15, 1813, replaced the depreciated *Riksdaler Courant* by a new *Riksdaler*, the value of which was fixed at somewhat less than two-thirds of the original metal value of the *Riksdaler Courant*, scaling rules were provided, partly based on exchange quotations. *Kongelige Forordninger* XVI, 237, 259, 270.

⁸ In Poland, the Polish "mark" instituted during the war by the German occupational authorities and taken over by the Polish government after Germany's defeat depreciated to 1,800,000th and was, on this basis, converted into the *zloty* by a decree of Jan. 20, 1924, *Dziennik Ustaw R. P.*, 1924, 88. Since 1922 the Polish Supreme Court had given relief to creditors of "adaptable" debts and to the debtors of executory contracts. Moreover, the court had, by a judgment of Feb. 26, 1922, *J.W.* 1923, 332, dismissed the claim of a mortgagor to have the mortgage stricken out in the landbook upon paying-off the nominal amount of the debt. However, the court did not claim the power of determining the amount to be paid; it rather pointed to a future legislative recasting rule promised by a law of May 9, 1919, *Dziennik Ustaw*, 1919, 489. This rule was laid down by the decree of 1924. Relying somewhat on German legislation it extends standards of revaluation so as to include loans and commercial credits of any kind, and it allows revaluation of paid-off debts only where the creditor had reserved his rights. Although much narrower than under the German law the powers conferred upon the courts still were very large and arbitrary. Kuratow-Kuratowski, "Les problèmes de la baisse du mark polonais dans le domaine du droit privé", (1925) 54 *Bulletin de la Société de Législation Comparée* 96; W. Müller in *Ostrecht* 1926, 1042^{at} 1046. How the law operated in practice the writer has been unable to ascertain. Rukser in *Zeitschrift für Ostrecht*, 1930, 321, mentions "the prudent self-restriction of the Polish courts in the administration of the revaluation provisions".

In Hungary, where the crown had depreciated to 1/4000th, the courts granted compensation extensively for loss through depreciation in the case of adaptable claims, including claims for "delay" damages

vided with regard to rouble debts, the objective of Communist legislation having been rather the destruction of the creditors' rights.⁹

The American scaling laws of the continentals' period took as a basis the value of the continentals in terms of silver at the time of contracting, ordinarily fixing a single ratio for each month.¹⁰ The French revolutionary legislation, however, besides differentiating the ratios of revaluation according to the various *départments*, did not rely solely on the price of specie, but used as the basis of revaluation, average figures computed from approximate prices paid for specie, for real estate, and for goods and wares.¹¹ It is remarkable that in the United States likewise a tendency appeared to overcome the strict metal-value rule. Chief Justice Marshall in *Faw v. Marsteller*,¹² interpreted "true value in specie" used by the Virginian scaling law to the effect that the difficulty in obtaining

but did not proceed to a general revaluation of debts. See the cases translated in *Zeitschrift für Ostrecht*, 1926, 1111. Definite regulation was directed through an act of April 1, 1928, rejecting "free" revaluation and strictly limiting statutory revaluation. 2 *Rechtsvergleichendes Handwörterbuch* (1929), art. *Aufwertung*, at 304; Sarrazin, "Ungarns Stellung zur Aufwertung", (1928) 27 *Bankarchiv* 414.

⁹ Although in some special cases courts seem to have arbitrarily granted a creditor an equitable compensation. Still the importance of the cases is uncertain and they do not affect the basic principle of annihilation of debts. Non-Russian courts have almost invariably recognized the absence of revaluation in the Russian law. See *Tillman v. Russo-Asiatic Bank*, 51 F.(2d) 1023 (C.C.A. 2d, 1931), *cert. den.* 285 U.S. 539 (1932); *Parker v. Hoppe*, 258 N.Y. 365, 179 N.E. 770 (1932); more distinctly, *Dougherty v. Equitable Life Assurance Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934); *Klochkov v. Petrogradski Bank*, 239 App. Div. 687, 268 N.Y. Supp. 433 (1st Dept., 1934), *aff'd* 266 N.Y. 596, 195 N.E. 216 (1935), *cert. den.* 296 U.S. 583 (1935); *Perry v. Equitable Life Assurance Soc.*, 45 T.L.R. 468 (K.B., 1929); Mixed Appellate Court of Alexandria, June 23, 1927, *Revue du Droit Bancaire* 1928, 356; French *Cour de Cassation*, Feb. 25, 1929, *J.D. Int.* 1929, 1306; Appellate Court of Paris, May 23, 1931, *ibid.* 1932, 441; Superior Court of Zurich, Dec. 18, 1928, *ibid.* 1930, 1159. German courts, too, held rouble debts not revaluable under Russian law. *Reichsgericht*, Dec. 13, 1929, *Warneyers Rechtsprechung*, 1930, 78; Appellate Court of Kiel, May 10, 1930, *J.W.* 1931, 156. In *Reichsgericht*, June 2, 1930, *Leipziger Zeitschrift*, 1931, 384, a rouble debt between German parties was revalued through application of German law. See also Roumanian Court of Cassation, May 12, 1924, *J.D. Int.* 1925, 818 (Bessarabian case, Tsarist law). The only exception is *Buerger v. New York Life Assurance Co.*, 43 T.L.R. 601 (C.A., 1927), Lord Scrutton dissenting, where the court relied on a defective expertise, see Freund, *Zeitschrift für Ostrecht*, 1927, 1379. The situation is now clarified by the expertise in the *Perry* case, *supra*.

¹⁰ Hargreaves, *Restoring Currency Standards* (1926) 1.

¹¹ Hargreaves, *op. cit.*, at 49; Caron, *Tableaux de Dépréciation du Papier-Monnaie* (1909), and the other writers cited in n. 4.

¹² 2 Cranch (6 U.S.) 10 (1804).

gold and silver coin at the time should be disregarded, and "the real value of property" employed in the determination of the debt. Although the affirmative part of this ruling is not very clear, an anti-metallistic attitude is distinctly present.

The scaling acts of the post-Civil War period are of only limited interest. Enacted under heavy pressure by the then more or less bewildered and incompetent legislatures of the defeated Confederate states,¹³ they had to remain within the bounds of Article I, Section 10 of the federal Constitution, preventing the states from impairing the obligation of contracts. Literally, this meant a canonization of the whole body of the judge-made law of contracts, and even the impossibility of restoring obligations obliterated through the annihilation of the Confederate currency. Practically, the fate of the scaling laws was entrusted to the discretion of the courts, particularly to the Supreme Court of the United States.¹⁴ The test most frequently used by the acts in determining the extent of revaluation was the value of the consideration furnished by the confederate-dollar creditor to his debtor, looking toward the time of the inception of the transaction.¹⁵ This doctrine certainly impaired the contract by substituting for the price negotiated between the parties something like a fair value of the object contracted for, and it was held unconstitutional by the Supreme Court in 1875,¹⁶ at a time when the work of liquidation and revaluation had practically been completed.

More important are the affirmative contributions of the Supreme Court to the revaluation problem. In *Thorington v. Smith*,¹⁷ the Court held that under an executory contract call-

¹³ Dawson and Cooper, *supra*, n. 6, at 715. The conditions in which those legislatures have operated have been described by historians. See 2 Fleming, *Documentary History of Reconstruction* (1907) 33.

¹⁴ Some states did not even possess any debt-regulation acts, or the latter were held invalid by the courts. Dawson and Cooper, *supra*, n. 6, at 753.

¹⁵ *Ibid.* at 732 and 747.

¹⁶ In *Wilmington & Weldon R. R. v. King*, 91 U.S. 3 (1875). It may be mentioned that the Supreme Court of Alabama in *Kirtland v. Molton*, 41 Ala. 548 (1868), held unconstitutional the Alabama act which had adopted the "consideration" test; after a reorganization of the court the act was upheld in *Herbert & Gessler v. Easton*, 43 Ala. 547 (1869). See Dawson and Cooper, *supra*, at 734. This is, in addition to *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Pet. (36 U.S.) 257 (1837), and the *Legal Tender Cases*, a third American instance of a reversal, by a newly tenanted highest court, of a decision on the constitutionality of a monetary law.

¹⁷ 8 Wall. (75 U.S.) 1 (1869). See *supra*, p. 30.

ing for payments in Confederate dollars the creditor was entitled to recover their actual value at the time and place of the contract, thus clearly granting revaluation, on the ground of the general law of contracts apart from any scaling law. And in *Bissell v. Heyward*,¹⁸ determination of the value of the Confederate dollar by reference to the United States dollar rather than to gold was held conclusive. *Thomas v. Richmond*,¹⁹ treating the same question, likewise fits very well into a revaluation doctrine since the one and two dollar notes of the City of Richmond, held invalid by the Court, constituted paper money, unfit for revaluation for obvious reasons.²⁰

The judicial process of restoration of debts was limited to this development. Contracts discharged by payment or otherwise remained closed.²¹ Revaluation had been started by the legislatures, their views, on the whole, were dominant in the actual regulation of the problem. Apart from the "consideration" test, the legislative position was basically adopted by the Supreme Court. Revaluation, then, was attained by a mixed legislative-judicial proceeding, under the guidance of the legislative branch of the government.

II. Judicial versus Legislative Revaluation

In the last analysis, there cannot be an exclusively judicial revaluation. That legislation must cooperate was acknowledged even by the German courts.²² Nevertheless, German revaluation was principally judicial. In examining it from the viewpoint of legal theory, we may ignore the extremeness of the German rulings and especially their sweeping retroaction, which were the result of historically unique political and economic conditions. So viewed, the German example illustrates

¹⁸ 96 U.S. 580 (1878). See *supra*, p. 30. Cf. also *Effinger v. Kenney*, 115 U.S. 566 (1885).

¹⁹ 12 Wall. (79 U.S.) 349 (1871). See *supra*, p. 30, n. 32.

²⁰ Infeasibility of revaluing paper money was recognized by the *Reichsgericht*, June 20, 1929, *R.G.Z.* 125, 273, and Nov. 25, 1926, 69 *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* 360. It is remarkable how the sound result was reached by both American and German courts from an entirely different point of departure and through a wholly different kind of reasoning. For a brief analysis of the German cases see Nussbaum, *op. cit. supra*, p. 269, n. 3, at 42.

²¹ Dawson and Cooper, *supra*, n. 6, at 718, 719. The same view prevailed after the downfall of the Continentals. *Anonymous*, 1 Hayw. (N.C.) 183 (1795), referring to a "constant practice" of the North Carolina courts; Hargreaves, *op. cit. supra*, n. 10, at 11 and 12.

²² See *supra*, p. 281, n. 66.

impressively the innate incompetence of courts to create a revaluation law of their own through mere application of broad jural principles. As a matter of fact, revaluation means revamping the financial structure of the country. Courts whose function is to decide individual controversies of limited character, have neither the data, the training, nor the facilities to cope adequately with a situation, which includes, besides its judicial aspects, so many relations to the monetary system, taxation, banking, the condition of farmers and urban real property owners, and the like. It is the function of the legislature to make the final allotment among the various interests involved.²³

Moreover, under any modern legal system, hindrance of substantive laws stands in the way of an independent judicial revaluation. Legal tender acts rest on strong reasons of public policy which, weighty in themselves, become still more vital in emergency situations. Legal tender laws distinctly require sacrifices from the individual when, within their range, the interests of the individual collide with the interest of the community. Those peremptory rules of law cannot be pushed aside by considerations of equity even if equity be recognized as an independent legal system. It has been suggested by American authors²⁴ that in an extreme depreciation the due-process clause may be invoked successfully against the legal tender laws by injured dollar creditors. Yet in the situation presupposed it is not the legal tender laws which are to be blamed but their abuse through unsound politics. And there is no constitutional protection from unsound politics. The government may be charged with inaction in connection with increasing injury to creditors, particularly for not having changed the legal tender laws. But such inaction is hardly a ground for constitutional relief. Moreover, a change of the legal tender laws may be precisely what will precipitate the disaster.

Obviously the legislative and political problems involved cannot be adequately handled by the courts. Thus, not even

²³ It is remarkable that the Massachusetts General Assembly at once set aside under the Act of 1747, Mass. Laws 1747, c. 1, a finding of the Judges of the Supreme Court on the depreciation in terms of silver, of the new-tenor notes. Fisher, *op. cit. supra*, p. 284, n. 1, at 424.

²⁴ Dawson and Cooper, "The Inflation in the North, 1862-1879", (1935) 33 *Mich. L.R.* 852, at 902.

the Supreme Court of the United States with its unrivalled power, would be authorized to ordain and shape revaluation. For technical reasons, too, this Court would be unable to master the formidable task. One has to remember that the *Reichsgericht*, a court embracing seven Civil-Senates, had to adjudicate more than two thousand revaluation claims.²⁵ And surrendering the development of the law, in a matter of national economy, to lower courts would be even worse than having a poor, but uniform law.

It is apparent that the lesson contributed by the German judiciary to a general theory of revaluation is essentially of a negative nature. In fact, despite the numerous collapses of monetary systems in the post-war period, it has not been followed anywhere.²⁶ The *Hooge Raad*, highest court of the Netherlands, and a tribunal inferior to no other, has in a monetary case stated a principle of universal validity in these forceful words: "The will of the legislature being the law of the parties, the court has no power, on the strength of its own opinion as to equity and good faith, to discard and to supercede the rule which the legislature, considering all interests involved, has ordained as the fairest and the most just one."²⁷

III. International Aspects of Revaluation²⁸

The international aspects of revaluation differ as they are seen from within or from outside the revaluing state.

²⁵ *Supra*, p. 276.

²⁶ As to Poland, Hungary, and Russia, see *supra*, pp. 285 and 286.

²⁷ Jan. 2, 1931, *Nederlandsche Jurisprudentie*, 1931, 274. This is not only a civil-law maxim. In *Hollingworth v. Ogle*, 1 Dall. 257 (1788), likewise a monetary case, Chief Justice M. Kean of Pennsylvania declared at 258: "The maxim is certainly just that it is better the law should be determinate and fixed, although it were originally erroneous, than that it should be precarious and fluctuating, according to the different talents and dispositions of the judges who are appointed to administer it."

²⁸ Literature: Nussbaum, *Bilanz der Aufwertungstheorie* (1929); Schlegelberger, "Die Aufwertung im Int. Privatrecht" *Z.A.I.P.* 1929, 869; Rost, "Das internationale Aufwertungsrecht Polens", in *Zeitschrift für Ostrecht*, 1929, 1301; 3 Neumeyer, *Internationales Verwaltungsrecht* 2 II (1930) 350; Melchior, *Die Grundlagen des Deutschen Int. Privatrechts* (1932) 294, with full references to the numerous German cases; Borsari, *Zur Behandlung der Währungsentwertung und der Aufwertung in der Schweizerischen Rechtsprechung*, thesis, Zurich (1933); Guisan, *La Dépréciation Monétaire et ses Effets en Droit Civil* (1934) 135 and *passim*; Pretzel, *Die Aufwertung von Fremdwährungsschulden* (1936).

(a) In the exercise of its sovereign power to revalue, the latter may restrict the effects of its action out of regard to possible international consequences.

German legislation merely provided for retaliation against discriminatory revaluation by other countries or refusal to revalue mark debts,²⁹ but this provision found little application.³⁰ The German courts were to find their own way through the jungle of conflict-of-laws problems. Two divergent paths were open to them. All mark debts could be revalued regardless of the proper law of the contract ("law-of-currency" theory), or all debts governed by German law could be revalued regardless of the currency contracted for ("law-of-contract" theory). The monetary character of revaluation led the Court along the first path. The law of contract theory accorded more closely, however, with the "good-faith" conception, basic to the German revaluation doctrine, and became dominant in German³¹ as well as foreign courts.³² German courts were bound in accordance with that theory even to revalue debts couched in terms of a non-German currency, provided the contract came under German law. The *Reichsgericht*, however, distinguished between depreciated and ruined foreign currencies, granting revaluation only for "catastrophic" depreciation.³³ To the difficulty of making that distinc-

²⁹ Revaluation Law of July 16, 1925, *R.G.Bl.* 1925 I 117, sec. 80. The Hungarian Revaluation Law makes revaluation dependent on reciprocity, see *Z.A.I.P.* 1937, 177.

³⁰ It was used only against Danish creditors, decree of Jan. 24, 1928, *R.G.Bl.* 1928, I 11.

³¹ *Reichsgericht*, Dec. 14, 1927, *R.G.Z.* 119, 259; Jan. 27, 1928, *R.G.Z.* 120, 70; June 6, 1928, *R.G.Z.* 121, 203; June 21, 1933, *R.G.Z.* 141, 212; Oct. 22, 1929, 9 Zeller, *Aufwertungsjaelle beim Reichsgericht*, no. 1873; Jan. 14, 1931, 85 *Seufferts Archiv* 97, and numerous other decisions cited by Melchior, *op. cit.*, at 300, n. 1.

³² *Infra*, n. 46 to 49.

³³ See judgments of Jan. 27, 1928, and Oct. 22, 1929, *cit.* in note 31 (Austrian crowns); Appellate Court of Berlin, Feb. 20, 1929, *Die Deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts im Jahre 1929*, p. 64 (Hungarian crowns); the same court, June 2, 1930, *Leipziger Zeitschrift*, 1931, 384 (roubles). Applying the law-of-contract theory, however, the *Reichsgericht* refused revaluation of Polish marks stipulated in an Austrian contract, considering the fact that Austrian law does not allow revaluation. On the other hand the judgment of Dec. 16, 1931, *J.W.* 1932, 1048, imposing German law upon an Austrian crown debt, granted the German creditor revaluation against a foreign bank, although bank accounts are exempt from revaluation (*supra*, p. 281); the court, however, confined the restriction to bank accounts conducted in German marks. Instances of currencies which were non-revaluable, because they were not "ruined", are the Dutch guilder (*Reichsgericht*, March 3, 1925, *Warneyers Rechtsprechung* 1925,

tion was added the complication that the creditor, who was, for example, entitled to payment in Austrian crowns, was enabled to obtain a greater amount in Germany than in Austria.

Where the contract theory was not available the *Reichsgericht*, in cases involving mark debts held by German creditors, declared revaluation to be monetary in character and employed the law-of-currency doctrine.³⁴ In a few cases the *Reichsgericht* even resorted to the law of the place of payment,³⁵ although quite clearly revaluation has nothing to do with "manner of payment" which alone is governed by that law.³⁶

Public expediency also played a part. In the case of a German mark debtor obligated to a Czechoslovakian creditor, the *Reichsgericht* did not challenge the Czechoslovakian refusal of revaluation.³⁷ But in the case of a Danish owner of Danish, formerly German, real estate, who had tendered the nominal amount of his debt to his German mortgagee and had obtained a Danish judgment that the mortgage might be stricken from the land-book, the *Reichsgericht* reversed the Appellate Court and refused to recognize the Danish judgment.³⁸

The situation, confused by the application of so many inconsistent ideas, was further complicated by a new development. A German manufacturer had sold and delivered yarn to another German firm for pounds, shortly before the collapse of the latter. The *Reichsgericht*, by judgment of June 21, 1933, awarded the seller an equitable "readjustment" (*Ausgleich*).³⁹ "Revaluation" was not involved since the

134; April 6, 1925, *J.W.* 1925, 1986) and the French franc (*Reichsgericht*, Feb. 25, 1926, *J.W.* 1926, 1323). For another use, by the *Reichsgericht*, of the same distinction, see *supra*, p. 149.

³⁴ Judgments of March 5, 1928, *R.G.Z.* 120, 277; March 10, 1928, *J.W.* 1928, 1790; Feb. 9, 1931, *J.W.* 1932, 582.

³⁵ Judgments of June 23, 1927, *R.G.Z.* 118, 370; Dec. 8, 1930, *R.G.Z.* 131, 41.

³⁶ *Infra*, sec. 30 at n. 5.

³⁷ Judgment of Dec. 14, 1927, *R.G.Z.* 119, 259.

³⁸ Judgment of June 25, 1926, *R.G.Z.* 114, 171. *Supra*, p. 282, n. 69.

³⁹ Judgment of June 21, 1933, *R.G.Z.* 141, 212. The same rule was applied to dollar debts, after the depreciation of the dollar. Judgment of April 2, 1935, *R.G.Z.* 147, 286. This was strongly criticized by Professor Lambert, *Un Parère de Jurisprudence Comparative* (1934). However, Professor Lambert himself advocates free judicial discretion in the administration of the depreciation problem, even indulging in arbitrary distinctions such as "catastrophic" and "non-catastrophic" de-

pound had merely "depreciated" and had not been "ruined". "Readjustment" and "revaluation" were like as two peas in this situation, however. In reversing the judgment of the lower court, the *Reichsgericht* might as well have been "revaluing" when it characterized as particularly material the questions whether the seller "in his whole business" had suffered or profited from the depreciation of the pound, in which the price was calculated; whether the purchaser, through other yarn transactions, had incurred losses due to the depreciation of the pound, and other questions remote from the contract under consideration. Thus, a new concept, and a surprising one, was applied to pound and dollar debts, then frequent in German commerce. Only six months later, however, the court held that the lender of English pounds was not entitled to a "readjustment", although the debtor knew that his creditor, apparently a German, had lent pounds rather than marks in order to avoid loss through depreciation of the mark. The court held that readjustment applied only to claims resulting from bilateral contracts.⁴⁰ The earlier case involved an executed contract, and it does not appear why the lender of money should be worse off than the holder of an unconditional claim for purchase money.⁴¹ The range of "readjustment" has since been narrowed even further in cases of bilateral contracts through the establishment of stricter requirements.⁴² Another source of uncertainty was the vacillating course of the courts in cases of implied gold clauses.⁴³ All this development, which was again upset in 1936 by the law on foreign devaluation,⁴⁴ reflects the judicial bewilderment caused by the loosening, through revaluation, of clear-cut juridical thought.

(b) Placing ourselves now outside the revaluing state, we must look to the conflict-of-laws rules of the forum. Application of the somewhat arbitrary German revaluation rule may appear strange to a non-German court, but that difficulty

precipitations. On this ground his criticism is bound to be inefficacious. See the present writer's review in (1935) 44 *Yale L.J.* 720, at 722, 922.

⁴⁰ Judgment of June 28, 1934, *R.G.Z.* 145, 51.

⁴¹ See Muegel, *J.W.* 1934, 2330, annotating the judgment of June 28, 1934. The *Reichsgericht* had expressly based its argument upon Muegel's writings which, Muegel points out, were misunderstood by the Court.

⁴² Judgment of May 28, 1937, *J.W.* 1937, 2823.

⁴³ *Infra*, p. 319.

⁴⁴ *Infra*, n. 58.

does not amount to a legal impediment. A revaluation law should certainly not be understood to mean that power to revalue is vested solely in domestic courts; on the contrary, German courts expect other courts to effect revaluation as was seen above.⁴⁵ The law-of-contract theory has been used by English,⁴⁶ Dutch,⁴⁷ Austrian⁴⁸ and other courts;⁴⁹ under it, marks have been revalued only where the contract was governed by German law. Czechoslovakian and Hungarian courts, regardless of the law controlling, refused revaluation of mark debts for reasons of public policy.⁵⁰ Similarly French courts also have refused to apply, as "strictly territorial", the Polish revaluation law.⁵¹ In turn, French attempts in 1936

⁴⁵ *Supra*, p. 282, n. 69. The result suggested above was also reached in *Kornatzki v. Oppenheimer*, [1937] 4 All. E.R. 133 (Ch., 1937), although the court's reasoning is partly disputable. *Supra*, p. 274, n. 29.

⁴⁶ Revaluation of mark contracts was denied under English law in *Anderson v. Equitable Life Insurance Society*, 42 T.L.R. 302 (C.A., 1926), granted under German law in *Re Schnapper, Westminster Bank Ltd. v. Schnapper*, [1936] 1 All. E.R. 322 (Ch., 1936), and in *Kornatzki v. Oppenheimer, supra*, where in fact an "adaptable" debt, namely an annuity of familial character was involved. In *re Chesterman's Trusts—Mott v. Browning*, [1923] 2 Ch. 466 (C.A., 1923), used the rule of "mark for mark" in a situation controlled by English law. However, revaluation proper did not exist at the time of the judgment.

⁴⁷ Revaluation of mark contracts denied, because German law was not applicable: *Hooge Raad*, Jan. 2, 1931, *Nederlandsche Jurisprudentie*, 1931, 274; *Court of Roermond*, Oct. 18, 1934, *ibid.* 1935, 1305, quoting this writer for the use of the nominalistic principle.

⁴⁸ Revaluation denied under the law-of-contracts theory: Austrian Supreme Court, April 24, 1927, *J.W.* 1927, 1899, and September 11, 1929, *J.W.* 1929, 3519 (regarding Polish marks); March 12, 1930, *Die Rechtsprechung* 1930, 105 (regarding German marks). See also judgments of Dec. 1, 1936, and March 24, 1937, *Die Rechtsprechung*, 1937, 220 and 221 (unjust enrichment, German marks).

⁴⁹ Supreme Court of Poland, Oct. 28, 1925, mentioned by Rost, *loc. cit.*, p. 290, n. 28, at 1309, and April 13, 1927, *Zeitschrift für Ostrecht*, 1928, 547. A similar result was reached by the German-Polish Mixed Arbitral Tribunal, July 16, 1927, 7 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 732 at 737 (referring to the law of the place of payment, which was at the same time the proper law of the contract).

⁵⁰ Supreme Court of Czechoslovakia, Jan. 19, 1934, and Dec. 6, 1934, *Z.A.J.P.* 1936, 172; Supreme Court of Hungary, case of 1930, summarized in *Z.A.J.P.* 1937, 179(4). The importance of these cases, however, is somewhat uncertain. See as to the Czechoslovakian court, the decision of Nov. 11, 1924, *J.W.* 1925, 513.

⁵¹ Appellate Court of Paris, April 19, 1928, *J.D.Int.* 1928, 695. A judgment of the *Tribunal civil de la Seine*, mentioned by Witenberg, *J.D.Int.* 1929, 593 plainly refers to the "ordre public". As a matter of fact the theory of the alleged "territoriality" of the legal tender rule is out of place on this score, *supra*, p. 52.

In *Deutsche Bank v. Humphrey*, 272 U.S. 517 (1926), involving a mark debt under German law, revaluation was not taken into account. Yet no reasons of public policy were underlying. The plaintiff seems not to have mentioned revaluation, possibly because he considered the exemption in respect of bank accounts (*supra*, p. 281) to apply.

to revalue "international" franc debts, have not turned out fortunately in the international field.⁵² A middle ground was sought by the Swiss courts which revalued mark debts, by application of the "good faith" principle embodied in Swiss law, rather than on the law-of-currency ground.⁵³ The German revaluation act was applied by them in terms only to dismiss the claim of a German mark creditor against a Swiss bank which relied on the non-revaluation of bank accounts under the German act.⁵⁴ On the other hand, the Swiss Federal Tribunal granted retroactive revaluation,⁵⁵ flatly rejected by other courts,⁵⁶ to German creditors against Swiss debtors. Surprisingly, no questions of revaluation have been presented to American courts in modern times. In the mark cases adjudicated in this country, mark revaluation proper was apparently never pleaded.⁵⁷

In 1936, Germany, the currency of which had given rise to most international problems of revaluation, effected a one-sided reduction of her commercial debts by a legislative regulation of the effects of non-German devaluations⁵⁸ in Ger-

⁵² *Infra*, p. 339.

⁵³ Judgments of June 3, 1925, *Amtlliche Sammlung* 51 II 303; Feb. 17, 1927, *ibid.* 53 II 76; March 26, 1931, *ibid.* 57 II 368; Nov. 13, 1931, *ibid.* 57 II 596. Cantonal courts have repeatedly applied German revaluation law where the contract was governed by German law. Guisan, *op. cit. supra*, p. 290, n. 28, at 162 n. 14.

⁵⁴ Judgment of July 3, 1928, *Amtlliche Sammlung*, 54 II 314. A minority of the court dissented, in a strong opinion which does not appear from the printed reports. See Borsari, *op. cit. supra*, p. 290, n. 28, at 82.

⁵⁵ Judgments of Feb. 28, 1930, *J.W.* 1930, 1900; Feb. 26, 1932, *Amtlliche Sammlung* 58 II 124. In the same sense Austrian Supreme Court, June 26, 1930, *J.W.* 1931, 635, and Mixt Tribunal of Cairo, Feb. 17, 1930, in *William II* (the former Emperor) v. *Adjourie*, *J.D.Int.* 1931, 467.

⁵⁶ Supreme Court of Norway, Feb. 2, 1934, cited in *J.D.Int.* 1937, 930; *Tribunal Civil de la Seine*, April 9, 1930, *J.D.Int.* 1930, 1012; May 26, 1936, *Gazette du Palais* 1936 II 329 [both French cases regarding mortgages on German real estate]; Court of Geneva, May 31, 1930, *Revue de Droit Int. Privé* 1930, 385 at 395; Court of Amsterdam, Dec. 10, 1928, *Nederlandsche Jurisprudentie*, 1929, 125; Court of Rotterdam, June 30, 1930, *Blätter für internationales Privatrecht*, 1931, 212.

⁵⁷ See *Hicks v. Guinness*, 269 U.S. 71 (1925); *Deutsche Bank v. Humphrey*, 272 U.S. 517 (1926), *supra*, n. 51; *Matter of Martha Lendle*, 250 N.Y. 502, 166 N.E. 182 (1929); *Re Ilfelder's Estate*, 136 Misc. 430, 240 N.Y.S. 413 (1930).

Among the 18th century revaluation cases, *Fowl v. Todd*, 1 Bay (S.C.) 176 (1791), presents international aspects. The Court refused to extend the statutory devaluation of the South Carolina pound to a bill of exchange drawn from the Bermudas on a South Carolina drawee. The creditor was awarded the full silver value as of the time of contracting.

⁵⁸ Law of June 26, 1936, *R.G.Bl.* 1936 I 515, and decree of Dec. 5, 1936, *ibid.* 1010, commented on in *Z.A.I.P.* 1936, 391, and by Domke,

many. Within the province of international finance [*Zwischenstaatlicher Geld-und Kreditverkehr*] obligations articulated in foreign currency are ordinarily⁵⁹ affected, according to the new German acts, by a devaluation of that currency, no matter what the law governing the contract,⁶⁰ and even if a gold clause guarantees the debtor's promise.⁶¹ The language of the statutes is broad and non-technical giving the German courts a vast leeway, and renders almost impossible a neat demarcation of the transactions covered by the law. It is even doubtful whether the Acts contemplate merely foreign "devaluation" or whether they include any "depreciation" of the foreign currency.⁶²

(c) There are few treaties settling revaluation problems. The German-Polish revaluation agreement of 1928 is an important instance.⁶³

"*La législation allemande etc.*", (1937) *Bull. I.I.I.* 36, 189, with further references. The 1936 law is translated in English in Foreign Bondholders Committee, *Annual Report* 1937, 421.

⁵⁹ The qualifications of the rule will not be discussed further. Some of them are examined in the comments cited *supra*, n. 58.

⁶⁰ The favored German debtors, however, must transfer 75 per cent of their "devaluation profits" to the government, by way of tax. Statute of Dec. 23, 1936, *R.G.Bl.* 1936 I 1126, and Executive Decree of Dec. 28, 1936, *ibid.*, p. 1151. A devaluation of less than 5 per cent is exempt from taxation.

⁶¹ On the gold clause aspects of the German legislation, see *infra*, sec. 29 at n. 23.

⁶² The German acts are concerned with foreign *Abwertung*, an unusual and legally novel expression. It appears to mean devaluation and is so translated in this volume, but the official commentaries point rather to a reduction in the value of money brought about by any measure of monetary policy, *Deutsche Justiz*, 1936, 1873 at 1874. This would in many cases include depreciation (*Entwertung*). The decree of Dec. 28, 1936, *supra*, n. 59, defines *Abwertung* plainly as depreciation, but this is conclusive only as to taxation. Another ambiguity of the law is mentioned by the Swiss Federal Tribunal, Feb. 1, 1938, *Amtliche Sammlung* 64 II 88 at 96.

⁶³ *R.G.Bl.* 1929 II 577; 1931 II 33. The Austrian treaties regulating "crown" debts, *supra*, p. 225, n. 27, also tend toward revaluation. Under the *Treaty of Versailles* [Part X] art. 296(d) private pre-war debts between the respective nationals of Germany and the victorious powers were to be paid, under certain conditions and by governmental clearing offices, on the basis of a pre-war rate of exchange in the currency of the respective victorious power, the governments guaranteeing the payments owed by their nationals. In the case of the depreciated German currency, this amounted in practice to revaluation of the German debts concerned. See Nussbaum, *Das Ausgleichsverfahren des Versailler Vertrages*, French edition: *La Procédure de Compensation* (1923). The *Treaties of St. Germain* (art. 248[d]), *Trianon* (art. 31[d]), and *Neuilly* (art. 176[d]) contain analogous provisions. See also *infra*, sec. 39 II, at n. 23.

As early as the Peace Treaty of 1783 between the United States and Great Britain it was provided in Art. 4: "It is agreed that Creditors on either side shall meet with no lawful impediment to the re-

EXCURSUS ON SAVIGNY'S "CURRENT
VALUE" DOCTRINE

Continental authors writing on debts and on revaluation frequently refer to Savigny's "current value" doctrine. For this reason a brief analysis of that doctrine may be of interest.

Savigny's discussion of monetary subjects in the first volume of his *Obligationenrecht* (1851) is not very fortunate. In the preface to the volume, written in his 73rd year, the great jurist confesses to a lack of entire familiarity with monetary subjects. Only the unusual authority resulting from his achievements in other fields of law explains his lasting influence in monetary discussion.

Savigny's theoretical failure in the legal statements of the concepts of money and debts has already been touched upon. However, he intended also to contribute to the practice of law. His general views were designed to furnish the basis of a precept for the treatment of debts affected by a depreciation of money. Money, Savigny points out, depends for its general acceptance—generator of its "general financial power"—on the recognition of its value by the community. From this unassailable proposition he draws the conclusion that pecuniary obligations are to be taken in terms of the "current value" of the time of contracting. "Current value" of pecuniary obligations, according to Savigny, is neither nominal nor intrinsic (metal) value nor yet value in terms of purchasing power; it is the commercial value, measured in terms of the standard (then usually silver) of the currency involved.¹

covery of the full value in sterling money of all bona-fide debts heretofore contracted." See *Dulany v. Wells*, 3 Harr. & McHenry (Md.) 20 (1792); *Hamilton v. Person's Adm.*, 2 Hayw. (N.C.) 236 (1803). This arrangement, bearing upon individual private claims, does not seem to have operated satisfactorily, since the *Jay Treaty* of Nov. 19, 1794, art. VIII (8 Stat. 116) provided that the claims of private creditors should be submitted to arbitration, the United States Government being subrogated to the individual debtors, the awards to be rendered in "specie without deduction". The matter was finally settled by the Treaty of 1802, art. I, 8 Stat. 196 according to which the United States promised to pay to England £600,000 in three annual installments at Washington.

¹ *Op. cit.* 433.

Accepting this concept, one would expect Savigny to conclude that should money depreciate the courts must disregard the nominal value, and award the creditor a sum sufficient to secure a lender, for example, the "current value" his money had when he lent it. This is indeed Savigny's opinion. However, he makes exception for the case of a *Zwangskurs* by which, as his examples indicate, he means the legal tender rule applied to depreciated money. He emphasizes that in a *Zwangskurs* situation the courts must employ the nominalistic rule "even though the Court may deem it reprehensible, harsh, and unjust".²

This exception which appears to have been overlooked by some later writers destroys the value of his rule for antinomialistic doctrine. Indeed, Savigny cannot be invoked in support of judicial revaluation because of the invariable opposition of the latter to legal tender rules.

But Savigny makes the point that the law may confer a nominal value upon a kind of money without rendering it legal tender. In such a situation his current-value doctrine would come into play. But when and where have those situations occurred?

Savigny's main example is taken from the history of the Prussian groschens ("gross coins"), a subsidiary money of copper and silver which circulated in Prussia during the last decades of the 18th century. The groschen were originally tariffed as a twenty-fourth of the (silver) thaler, then the Prussian money unit. After the unsuccessful war of 1806 against Napoleon, the groschen depreciated, and in 1811 was devalued, to four-sevenths of its original value. Savigny takes the case of a loan of 400 thalers made in groschens which at the original ratio numbered 9600.³ He holds that after depreciation the debtor must pay either 400 thalers or such number of groschens as at the original ratio would have amounted to 700 thalers. The reason for that conclusion is that the "current value" of the groschens had diminished to that extent. The result would evidently be the same under a nominalistic theory since the groschens, through the devaluation, were given a lower nominal value in thalers. Savigny's example thus reveals nothing. Even assuming that there had

² *Op. cit.* 445.

³ *Op. cit.* 456, 416.

been only a depreciation without devaluation (and Savigny places the entire emphasis upon depreciation) it would be unenlightening. The contract called for thalers. The creditor was, therefore, entitled to silver money and was under no duty to accept groschens which, according to Savigny, were not legal tender.

The current-value theory thus appears to have no application to Savigny's example. Nor is it applicable to depreciated money with a nominal value in the discharge of public obligations (public receivability), another situation apparently regarded by Savigny as coming under his theory.⁴

Savigny cites a Prussian decree of 1808 regarding loans made in depreciated groschens which provided that the current value ("*Kurs*") at the time of lending should be taken into account in determining how many groschens should be repaid.⁵ A closer study of the decree reveals that it envisages groschen loans made with reference to thalers, this reference being interpreted by the decree as an indication of value rather than as an obligation, in terms of thalers. The significance of the decree, therefore, shrinks to a legislative interpretation of a local (though practically important) usage, evolved under a dual currency. If Savigny's discourse is to be read in the light of the Prussian decree, it forgoes any materiality for a general theory of debts.

Moreover, the decree does not plainly and simply use the "current-value" concept. It presupposes, as a condition of that use, a groschen depreciation of more than 10 per cent and it conclusively prescribes the employ of half-month averages of certain local quotations indicated in the decree—qualifications not mentioned by Savigny. In fact, the decree is but another instance of a scaling law. Scales may, of course, be elaborated by the legislature on the basis of "current value". But the legislature may choose to take the intrinsic value or the purchasing power (as was done in the case of the *assignats*) or the

⁴ *Op. cit.* 424, note a, referred to at 445, mentions the Prussian *Kassenanweisungen* and the Prussian *Tresorscheine* which had only public receivability (the latter had been legal tender up to 1813). See Savigny, *op. cit.* 498; Sobernheim, "*Die Geldentwertung etc.*" in (1923) 66 *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* 308. Regarding public receivability, see *supra*, p. 43.

⁵ *Op. cit.* 494. The decree is found in *Sammlung der für die Preussischen Staaten erschienenen Gesetze und Verordnungen 1806-1810*, p. 304.

rate of foreign exchange as a scaling measure. It is therefore not clear why the current value should alone be recognized. If Savigny's *allgemeine Vermögensmacht* is to be the point of departure, emphasis should be laid on purchasing power rather than on "current value". This holds good whether current-value be used as a principle of legislative or of judicial policy.⁶

Savigny was by no means the initiator of an antinominalistic doctrine. He requires obedience to the *Zwangskurs*; and in the absence of a *Zwangskurs* he suggests the restoration of depreciated debts at their value *at the time of contracting*, a principle known since medieval times. His emphasis on "current value" certainly is original, but remains without results. His doctrine itself has been rejected by discerning authors.⁷

⁶ The current-value theory had first been suggested by Hufeland as a solution of the Bavarian-Tyrolean monetary imbroglio, *supra*, p. 224, which was characterized by the absence of a recasting rule despite (1) depreciation of the existing unit and (2) establishment of a new sovereignty, again a singular situation. Savigny also refers to a loan made in depreciated Austrian paper money prior to the devaluation of 1811 (*op. cit.* 438), but as in the example of the groschens he leaves the devaluation enactments out of the picture. There is no evidence that the Austrian courts resorted to a current-value doctrine.

⁷ Thus by Hartmann, *op. cit. supra*, p. 213, n. 5, at 67; Knies, *Das Geld* (2d ed., 1885) 396; Helfferich, *Geld* (1923) 360 [omitted in the English translation by Infield]. It was considered as "universally rejected" by the Roumanian-German Mixed Arbitral Tribunal, 7 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* (1927) 738 at 740.

CHAPTER VI

GOLD CLAUSES AND OTHER PROTECTIVE CLAUSES

SECTION 25

OCCURRENCE AND TYPES OF GOLD CLAUSES

I. *Gold Clauses and Silver Clauses. The Facts*¹

In a modern monetary system the greatest danger to persons contracting in terms of money lies in the fact that the monetary unit may be severed from gold, and may therefore be subjected to the unpredictable processes of depreciation and appreciation in the markets. Before the appearance of the modern monetary systems, it was debasement or alteration in the tariffing of the coin contracted for that was feared.² Hence creditors have never been free from the threat of monetary changes. As far back as the latter part of the middle ages, when monetary economy began to develop, creditors protected themselves against losses from such changes by

¹ For comparative discussions, see Midas, *Die Goldklausel im Währungsverfall* (1924); 3 Neumeyer, *Internationales Verwaltungsrecht*, part 2 III (1930) 337; Nussbaum, *Vertraglicher Schutz gegen Schwankungen des Geldwertes* (1928); Henry Ussing, "Guldsklausuler", *Ugeskrift for Retsvaesen* (Copenhagen) 1933 B 264; Nussbaum, "La Clause-Or dans les contrats internationaux" in (1934) *Académie de Droit International de la Haye*, 43 *Recueil des Cours* 559; Domke, *La Clause "Dollar-or"* (2d ed., 1935, Paris); Domke, *La clause valeur-or dans la jurisprudence récente*, *Nouvelle Revue de Droit Int. Privé* 1935, 29; Libourel, *Het Vraagstuk der Goud-Clausule in Nederland* (1932); John Gabriels, *Goud-Clausules* (Rotterdam, 1936); Wortley, "The Gold Clause", (1936) *British Yearbook of Int. Law* 112; Ulrich, *Die Goldklausel* (Switzerland, year not indicated). Special literature on the national gold clause laws is referred to *infra*, p. 361, n. 25 (American); p. 335, n. 1 (French); p. 329, n. 12 (German); p. 349, n. 73 (Italian); p. 361, n. 19 (Swiss). The international aspects of the gold clause are dealt with *infra*, sec. 30. The *Bull. I.I.L.* and *Z.A.I.P.* contain regular reports on gold clause cases and writings.

² *Supra*, p. 10.

rate of foreign exchange as a scaling measure. It is therefore not clear why the current value should alone be recognized. If Savigny's *allgemeine Vermögensmacht* is to be the point of departure, emphasis should be laid on purchasing power rather than on "current value". This holds good whether current-value be used as a principle of legislative or of judicial policy.⁶

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² *Supra*, p. 10.

appropriate contractual provisions.³ Taeuber⁴ cites the following protective provisions in French contracts of the first half of the 16th century: "25 *scuta solis*⁵ *boni auri et justiponderis*," "25 *scuta solis auri et in auro*," "50 *librae*⁶ *in 25 scutis auri*," "25 *scuta solis solvenda in eadem specie*," "25 *scuta solis solvenda in pecunia eiusdem bonitatis et qualitatis*". Sometimes the monetary provisions were even more specific. While the protective clauses of early times were ordinarily articulated in terms of special coins of gold or silver,⁷ under a de-

³ Helfferich, "Die geschichtliche Entwicklung der Münzsysteme" in (1895) 64 *Jahrbücher für Nationalökonomie und Statistik* 801, 808, points out that in Northern Germany, in the middle of the 18th century, pure and simple debts were still "something new". This is probably true for long-time debts. An English protective clause of the latter half of the fifteenth century is presented in Y.B. 9 Edward IV, 49 [Hil. T. pl. 61] (1470). A loan was given in 2 Ed. IV (1462/3) of 40 pound sterling in groates and nobles, nobles being a gold coin. The debtor obligated himself to pay back the said £40 in the same metal at the value they had when received. Uncommon, though significant, is a case decided in 1300 by the Fair Court of St. Ives. (1 Selden Society, *Select Cases in the Law Merchant* 80). The buyer paid the purchase price in crockards and pollards, inferior coin. When the seller objected, the buyer promised to exchange the coin for good ones if the seller should have difficulties in disposing of the former. Shortly afterward the coins were lowered in value. (*Statutum de falso moneta*, 27 Edw. I (1299)). The buyer was held liable for full compensation. See also as to "blancmoneyn" clauses, Hale, *The History of the Pleas of the Crown* (1736) 207.

⁴ In "Molinaeus' *Geldschuldlehre*" (1928) 48.

⁵ French: "*écu au soleil*", the most important French gold coin. [The names *scutum* and *scutus* were used interchangeably.]

⁶ On the *libra*, see *supra*, p. 10.

⁷ A protective clause resembling the ancient type appears in the lease of 1791 adjudicated in *Butler v. Horwitz*, 7 Wall. (74 U.S.) 258 (1868). The stipulation was for an "annual rent of fifteen pounds current money of Maryland, payable in English golden guineas weighing five pennyweights and six grains, at thirty-five shillings each—and other gold and silver at their present weights and rates established by Act of Assembly".

As a matter of fact the protective clauses of the "pre-system" period frequently became even more involved in trying not only to protect the creditor against the disadvantageous effects of debasements and other deterioration of coin, but also against disadvantageous "tariffing". The multitude of objectives easily led to obscure and even inconsistent stipulations. A considerable part of the activities of ancient jurists was devoted to the drafting and interpretation of monetary clauses and to the remedying of the mistakes and frauds connected with them. Some instances of controversial clauses are mentioned in Taeuber, *Geld und Kredit im Mittelalter* (1933) 296 n. 864.

In Martinus Lipenius, "*Bibliotheca Realis Juridica*" (Leipzig, 1757, with *Supplementa* and *Emendationes* 1785, 1788), one finds *sub. tit. "moneta"*, "*monetae mutatio*", etc., scores of monographs more or less devoted to the interpretation of monetary stipulations. *E.g.*, Budelius, *De Monetis et Re Nummaria* (Cologne, 1591), for centuries the most famous treatise on money matters, is largely concerned with interpretative problems of the type mentioned.

veloped monetary system they call for the payment of a definite amount of the basic unit, with the *caveat*, however, that only gold coins or silver coins of the system or either of them may be used in payments, thus excluding paper money and minor coins. Pure silver clauses are rare although they were used more frequently after the California gold rush.⁸ Alternative gold-silver clauses are more frequently found. In *Dalloz Périodique*, the famous French reporter system, of 1872⁹ one reads that the clause *en or ou en argent et non autrement* appears "in almost every notarial contract". In the United States, until the sixties, the requirement of payment "in specie" was very frequent¹⁰ and in various European countries the phrase "*en espèces sonnantes*," "*in klingender Münze*" (in tingling coin)¹¹ was popular with draftsmen. However, it was the gold clause which had by far the greatest expansion. By this clause the debtor promises to pay a *sum of money*, gold coin or equivalent.¹² It is found chiefly in long

⁸ In *Holyoke Water Power Co. v. American Writing Paper Co., Inc.*, 68 F.(2d) 261 (C.C.A. 1st, 1933), the contract which had been drafted in 1859, provided for a yearly rent of 260 ounces troy weight of silver of the 1859 standard of American coinage or its equivalent in gold, the quantity of gold thus being made dependent on a silver value. The Court remarked that, owing to the discovery and mining of gold in 1849 and in the '50's silver was the more stable metal and that contracts frequently were written in terms of silver. See also silver clauses passed on in *Mather v. Kinike*, 51 Pa. 425 (1866), ground rent of 1773, and *Christ Church Hospital v. Fuechsel*, 54 Pa. 71 (1867), ground rent of 1794. Touching the validity of the clauses under the Joint Resolution of 1933, see *infra*, p. 359, n. 9.

The most important silver clause case was decided by the Austrian Supreme Court in the matter of the 1873 and 1874 bonds of the Austrian State Railways Corporation (*Staats-Eisenbahn-Gesellschaft*; abbreviated *Steg*). The creditors were entitled to receive Austrian crowns or French francs at their then parity, crowns to be payable in "real silver coin". In 1930 the clause was held good, giving the creditors a yield higher than the stipulated franc amount, because of the depreciation of the franc. Judgment of Dec. 17, 1930, *Die Rechtsprechung* 1931, 1. Silver clauses were also dealt with by the Italian Court of Cassation, April 18, 1932, *Foro Italiano* 1933 I 193. They seem to appear more frequently in Dutch mortgage deeds, Libourel, *Het Vraagstuk der Goud-Clausule in Nederland* (1932) 37.

⁹ D.P. 1872 II 51, note.

¹⁰ See *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871), and particularly *In re Missouri Pac. R. Co.*, 7 F. Supp. 1, at 3 (D.C.E.D. Mo., 1934), where a short history of the clause is given. *Hartley v. McAnulty*, 4 Yeates (Pa.) 95 (1804), states that "specie" means gold and silver coin.

¹¹ The clause is expressly mentioned in the Austrian Civil Code 986. See also Appellate Court of Venice, July 15, 1937, *Foro delle Venezie*, 1937, 763.

¹² The same concept underlies the definitions of gold clauses set out in the Dutch, Canadian, and Manitoba Gold Clause Acts and the

term contracts, such as mortgage deeds, life insurance policies, and loan bonds,¹³ particularly of an international character. In times of monetary troubles, however, the gold clause makes an appearance even in bills of exchange and other short term evidences of indebtedness.¹⁴ With occasional exceptions, the clause covers both principal and interest.¹⁵

There is probably no country in which the gold clause has been more widely used than in the United States. Before 1933 gold obligations in this country totalled probably more than one hundred billion dollars (nominal amount).¹⁶ The

American Joint Resolution of June 5, 1933 which, however, does not employ the term "gold clause". See *infra*, sec. 29 I. The statutes differ somewhat in drawing the boundary line.

¹³ In France, too, sometimes in long-time rural lease contracts, see Rivière, *Revue de Droit International Privé*, 1932, 1. For an instance, see French *Cour de Cassation*, Nov. 27, 1933, *D.H.* 1933, 585. The same seems to be true in Holland and Belgium, the Gold Clause Acts of which (see *infra*, sec. 29, n. 5) expressly provide for abrogation of gold clauses contained in leases. And during the English parliamentary debates in 1811 on the report of the Bullion Committee, it was mentioned that in Ireland there were clauses in many of the leases for payment of gold. 19 Hansard, *Parliamentary Debates* 977 (speech of Mr. Huskisson). As to the Irish currency, see 2 Palgrave, *Dictionary of Political Economy* (1917) 457.

¹⁴ Before the World War there was frequent use of "gold francs" in the Balkans and in the Near East, and of "gold lire" in foreign trade with Italy. Midas, *Die Goldklausel im Währungsverfall* (1924) 18. After the war the employment of gold units became common in Germany and other inflation-stricken countries, *infra*, p. 312. Bills of exchange and checks were allowed to be articulated in terms of gold marks by a German decree of Feb. 6, 1924, *R.G.Bl.* 1924 I 50. This decree was repealed in 1933, see *infra*, sec. 27, n. 21.

¹⁵ In *Woodruff v. Mississippi*, 162 U.S. 291 (1895), the levee board of Mississippi had in 1872 issued bonds payable "in gold coin of the United States", the coupons, however, being payable "in currency of the United States". The explanation lies probably in the fact that the board anticipated the rise of the dollar to parity before the bonds would have matured. In the *Rosario* and *San Paolo* cases, *infra*, sec. 26, n. 1 and 4, a gold clause was promised probably solely for interest, although the Court extended it to principal. The Swiss Federal Tribunal, Feb. 11, 1931, *Amtliche Sammlung*, 57 II 69, *J.D.Int.* 1931, 510 at 518, is mistaken in declaring that a gold clause limited to interest constitutes an "anomaly and an absurdity".

The Court of Appeal in *British and French Trust Corp., Ltd. v. New Brunswick Ry. Co.*, [1937] 4 All. E.R. 516 at 537 (C.A., 1937), extends the gold clause of a bond to coupons which did not in terms contain the clause. This view would seem acceptable.

¹⁶ *N. Y. Herald-Tribune*, April 13, 1933, section 2, at 8 col. 1 gives these approximate figures of gold obligations in the United States: 27 billion dollars, U.S.A. Security Bonds; 16 billion dollars, state and municipal bonds; 12 billion dollars, foreign dollar bonds; more than 50 million dollars, corporation bonds and real estate mortgages. The statistics were compiled, the writer understands, by the Institute of International Finance, New York. Another estimate totals \$123,869,023.89, Hanna, "Currency Control and Private Property", (1933) 33 *Col. L.R.* 617, at

insertion of the gold clause in bonds and mortgages was a matter of routine. Memories of the Continentals, the state bank notes, and the greenbacks contributed to this result; but probably the most effective cause was the pre-war silver agitation.¹⁷ In Germany it was doubtless the bimetallistic endeavors of powerful agrarian parties which before the World War caused the gold clause to pervade the whole field of mortgages, rural and urban. After the war something like a "gold-clause rush"¹⁸ developed, a psychological compensation for the lack of real gold. In France the spectre of the *assignats* and the suspension of redeemability of banknotes, from 1848 to 1850,¹⁹ were probably together responsible for the spread of gold and specie clauses.²⁰

Gold clauses are not, however, a universal phenomenon. England, despite the suspension of the *Bank Act* during and after the French wars, remained aloof from them. It was an article of English commercial faith that the pound sterling was as good as gold; the addition of a gold clause to the sterling obligation was regarded as an impairment of the national currency.²¹ It is significant that in the Peace Treaties at the end of the late War, England was the only victorious power which forebore to require a gold clause in the reparations provisions.²² Pounds sterling were demanded and noth-

633, n. 20. In *Norman v. Baltimore and Ohio R. R.*, 294 U.S. 240 at 313 (1935), a gold clause case, the court figured the total of gold obligations at 75 billion dollars or more.

¹⁷ The Federal District Court of Missouri, *In Re Missouri Pac. R. Co.*, 7 F. Supp. 1 at 3 (1934), characterizes the customary American gold clause as "a sonorous and mouth-filling phrase" which "adds a dignity and a glamour of richness to all bonds, particularly to those which the maker had not and never had the remotest intention of ever paying in anything".

¹⁸ *Infra*, p. 312.

¹⁹ Decree of March 15, 1848, repealed by law of August 6, 1850, D.P. 1848 IV 49, 50 and 1850 IV 183.

²⁰ Gold clauses are also customary in Denmark and they are widespread in other Scandinavian countries. Ussing in Z.A.I.P. 1933, 958. On the Swedish "gold-crown" clause, *infra*, p. 321, n. 33.

²¹ See *supra*, p. 261 (Resolution Vansittart).

²² Treaty of Versailles, art. 262, Treaty of St. Germain, art. 214. Consequently, among the nine parts of the German Government International Loan of 1930 ("Young Loan") the English part is the only one which does not contain a gold clause. Another remarkable fact is that in South Africa before the World War protective clauses ordinarily called for payment of "good current British money" or of "British Sterling money", with no mention of gold. *Loxton v. McCrae*, 1 *South African L.T.* 56 (1932). When the pound sterling depreciated, the "sterling" clause was set aside in *Fisher, Simmons & Rodney (Pty.), Ltd. v. Munesari*, 53 Natal L.R. 77 (Durban Local Div., 1932).

ing more. It was only after the War that a solitary gold sterling clause made its appearance in English international financing.²³ In Holland²⁴ and Switzerland²⁵ also, the domestic use of gold clauses seems to have been restricted.

Judicial or legislative maintenance of gold clauses during and after depreciation is wholly different from revaluation. The difference is not merely that a gold clause, unlike revaluation, presupposes a specific agreement by the parties, but also that instead of being a restoration of an impaired debt, the gold clause safeguards the debt against impairment at all by depreciation. The aim of the gold clause is to maintain the full gold value of the debt whereas revaluation seeks the equitable apportionment between the parties of the loss caused by depreciation. Although these would appear to be obvious differences, gold clauses and revaluation are sometimes not distinguished in legal discussion.²⁶

II. Gold Coin Clauses and Gold Value Clauses

The typical gold clause consists of a promise by a money debtor that the sum promised will be paid in gold coins. On the continent it has been customary to add to the nominal expression ("1000 francs", "1000 lire") a brief phrase such as "in gold", "in gold coin",²⁷ or merely to express the sum

²³ Namely in *Feist v. Société Intercommunale Belge d'Electricité*, [1934] A.C. 161 (H. of L., 1933) (*infra*, sec. 28, n. 64). The situation in the English dominions is different. Thus in mortgage transactions gold clauses are apparently used in the formerly German sections of New Guinea, *Jolley v. Mainka*, 49 C.L.R. 242 at 243 (High Court of Australia, 1933). This is attributable to German tradition. Canada, here as elsewhere, seems to lean towards the American model rather than toward the English; *infra*, n. 37.

²⁴ See Engelberts-Vissering-Libourel, *Inflatie en Goud-Clausule in Nederland* (1922) and Libourel, *Het Vraagstuk der Goud-Clausule in Nederland* (1932), *passim*. Both of these were valuable contributions to their subject matter and dissuaded from the introduction of gold clauses into Dutch practice. A special situation seems to have existed as to leases, *supra*, n. 13.

²⁵ The Swiss National Bank, in 1929, expressly objected to using the gold clause in domestic Swiss transactions. And such use seems not to have existed previously. See Henggeler, "Die Abwertung des Schweizerfrankens", *Zeitschrift für Schweizerisches Recht* 1937, 158a at 197a.

²⁶ Thus by Hubrecht, *Stabilization du Franc et Valorization des Créances* (1928) 447, 449.

²⁷ The German-Swiss Gold-Mortgage Treaty of 1920, R.G.Bl., 1920, 2023 lists the following formulas: *in Gold*; *in deutschem Gold*; *in deutschem Reichsgoldgelde*; *in deutschen Reichsgoldmünzen*; *in deutschen Goldmünzen*; *in deutscher Goldwährung*; *in Reichsgoldwährung*; *in klingender Münze*; *in klingendem Gelde*. (As to the two last mentioned

to be paid as 1000 "*francs-or*" (gold francs).²⁸ In the United States the clause almost universally employed is more elaborate; it reads: "to pay . . . dollars in gold coin of the United States of (here is frequently added: "or equal to") the standard of weight and fineness existing on . . ." (the date of contracting follows). This formula has now spread beyond the frontiers of the United States.²⁹

On the other hand the clause may merely purport to require payment, in currency, of an amount equal to the value of a quantity of gold coins. This clause is rarely found by itself in explicit form, *e.g.*, "payment of the value of 1000 gold dollars".³⁰ In earlier American practice, however, there sometimes appear alternative provisions of this type: "in gold or its equivalent;"³¹ "in gold coin . . . and if said principal . . . is not paid in gold coin . . . then I promise . . . to pay in addition thereto and as damages such further amount and percentage as may be equal to the difference in value . . . between such gold coin and paper evidence of indebtedness of the States or of the United States, that are or may hereafter be made a legal tender in payment of debts by the laws of this state or the United States;"³² "in gold or

phrases, see *supra*, n. 11). Besides these, in *Reichsgericht* March 24, 1922, *R.G.Z.* 104, 218 the formula in *jetziger Reichsgoldmünze* is mentioned.

²⁸ However, "there is in law no such thing as a gold franc", *Sup. Court of Ontario* in *Derwa v. Rio de Janeiro Tramway, Light & Power Co.*, [1928] 4 D.L.R. 542 at 552 (1928). See also as to gold marks, *infra*, p. 312, and as to gold peso, gold leva, etc., *infra*, pp. 320, 321.

²⁹ It appears, *e.g.*, in *Feist v. Société Intercommunale Belge d'Electricité*, [1934] A.C. 161 (H. of L., 1933); in *Reichsgericht*, April 27, 1936, 35 *Bank Archiv* 442; and in Swedish Appellate Court, April 16, 1935, *re Skandia Insurance Cie, Ltd. v. Swedish National Debt Office*, 2 *Plesch, The Gold Clause* (1936) 66. Some Swiss examples are cited by Henggeler, "*Abwertung des Schweizerfrankens*" in *Zeitschrift für Schweizerisches Recht* 1937, at 216a, n. 19.

³⁰ The only American instance on record seems to be *Levy v. Asbestos, Inc.*, 153 Misc. 125, 273 N.Y. Supp. 911 (1934) [promise by a mortgagor to "pay the difference between the proper value of the mortgage or increase the mortgage to its value in gold measured in paper dollars." This is an example of very poor draftsmanship.] A promise by the mortgagor to pay, in silver or notes, an amount "on the rate of gold coin" sometimes appears in Dutch deeds. Libourel, *Het Vraagstuk der Goud-Clausule in Nederland* (1932) 36.

³¹ *Reese v. Stearns*, 29 Cal. 273 (1865); *Mitchell v. Henderson*, 63 N.C. 643 (1869); *Killough v. Alford*, 32 Tex. 458 (1870); *Dunn v. Barnes*, 73 N.C. 273 (1875). Similarly *Jolley v. Mainka*, 49 C.L.R. 242 (High Court of Australia, 1933) ["payable in gold or in currency equivalent thereto"]. See also Act of March 18, 1869, 16 Stat. 1, 31 U.S.C. 731, providing for payment in "coin or its equivalent."

³² *Lane v. Gluckauf*, 28 Cal. 289 (1865).

if paid in paper, the amount thereof necessary to purchase the gold at the place of payment".³³ Much more important, however, are implied promises to pay the value of a certain quantity of gold coin.³⁴

Promises to pay in gold coin are spoken of as "gold-coin clauses" [*clause espèces-or*; *Goldmünzklause*; *clausola corso oro*], promises to pay the value of gold coin as "gold-value clauses" [*clause valeur-or*; *Goldwert-Klause*; *clausola valore-oro*]. This terminology, continental in origin,³⁵ has been adopted by the Supreme Court of the United States.³⁶ The distinction is made with particular clarity, although not in those terms, in the Joint Resolution of June 5, 1933, abrogating the gold clauses,³⁷ and it has become of great importance in judicial interpretation.³⁸

A further variation of minor importance is that some clauses refer merely to gold coins, while others, *e.g.*, the customary American formula, which speaks of gold coins as of the time of contracting, fix the amount of fine gold to be given in payment. The latter clause protects the creditor against later debasement of the gold coin such as occurred in the United States in 1834.³⁹ This aim appears quite clearly in such gold coin clauses as the following: "\$1000 gold coin of or equal to the standard . . ." ⁴⁰ The words italicized differentiate the clause from alternative gold value clause which is usually phrased as follows: "\$1000 gold coin or equivalent."

III. Gold Bullion Clauses

After inflation the attempt is sometimes made to escape the risks of depreciation by gold clauses requiring payment

³³ *Brown v. Welch*, 26 Ind. 116 (1866).

³⁴ *Infra*, sec. 28 IV.

³⁵ Nussbaum, *Das Geld* (1925) 164; Gény, "*La validité juridique de la clause 'payable en or'*", *Revue Trimestrielle de Droit Civil* 1926, 557 at 564; Ascarelli, *La Moneta* (1928) 160; Ussing in *Ugeskrift for Retsvaesen* (Copenhagen) 1933 B 264.

³⁶ *Norman v. Baltimore and Ohio R. R.*, 294 U.S. 240 (1935). See Nussbaum, "Comparative and international aspects of American gold clause abrogation", (1934) 44 *Yale L.J.* 55.

³⁷ 48 Stat. 112, 31 U.S.C. 463. The Canadian Gold Clause Act of 1937 adheres closely to the American model. *Bull. I.I.J.* 37, 109.

³⁸ The main problem is whether a gold value clause is implied in a gold coin clause, *infra*, sec. 28 IV.

³⁹ *Supra*, p. 179.

⁴⁰ Lord Romer, of the English Court of Appeal felt the words "or equal to" to be "mere surplusage", [1933] 1 Ch. 684 at 708.

in gold bullion. In *Holyoke Water Power Co. v. American Writing Paper Co.*, the plaintiff, in 1894, had executed a number of leases of water power by which the lessee promised to pay as rent "a quantity of gold which shall be equal in amount to \$1,500 of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency". This alleged gold bullion clause, however, was held by the Supreme Court of the United States, in a brilliant and forceful opinion written by Mr. Justice Cardozo, to constitute a monetary obligation with a gold clause.⁴¹ The court pointed out that what the creditor really wanted and the debtor promised, were dollars: "Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction".⁴² Not even the use of measures of weight to fix the quantity of gold to be given in payment⁴³ would protect the creditor against such realistic methods of interpretation.

In Germany, at the height of inflation, the legislature encouraged the use of sham gold-bullion clauses. By a law of June 23, 1923,⁴⁴ permission was given to record mortgage-obligations requiring payment of the value of so many kilograms and grams of fine gold despite the fact that German mortgage law required the debts secured by the mortgage to be for a sum certain expressed in marks. As a matter of fact the legislative experiment of 1923 was practically abandoned

⁴¹ 300 U.S. 324 (1937). Comment in (1937) 15 *North Carolina L.R.* 196.

⁴² 300 U.S. 324 at 336.

⁴³ As done in *Dewing v. Sears*, 11 Wall. (78 U.S.) 379 (1871), reversing 96 Mass. 413 (1867), and in *Emery Bird Thayer Dry Goods et al. v. Williams et al.*, 15 F. Supp. 938 (D.C.W.D. Mo., 1936). In the first case the contract called for a payment in four installments of a yearly rent of 4 ounces, 2 pennyweights and 12 grains of pure gold, in coined money. The court ordered the judgment to be rendered in terms of coined dollars, under the theory of *Bronson v. Rodes*, *infra*, sec. 27, n. 5. In the *Emery Bird* case the contract was for a yearly rental of 557,280 grains of pure unalloyed gold, with an option in the lessors to demand a quarterly payment of \$6000 in lawful money. The monetary implications of such ostensible bullion-clauses are obvious, but were held irrelevant by the Court. Nevertheless, and despite the Holyoke decision, this theory of the *Emery Bird* case was subsequently sustained, 98 F.(2d) 166 (C.C.A. 8th, 1938), by means of a conceptualistic interpretation of the Joint Resolution as well as of the gold clause in question, Judge Woodrough dissenting in a striking opinion.

⁴⁴ *E.G.Bl.* 1923 I 407.

when in 1924 registration of mortgages in terms of "gold marks" was permitted.⁴⁵

A real gold-bullion contract is that envisaged by the French Civil Code, art. 1896, which provides that the nominalistic rule of art. 1895⁴⁶ shall not apply where "the loan is made in bars" (*lingots*). This rule has been adopted by other Codes on the French model⁴⁷ but seems to be without practical importance.

IV. Accounting in Gold (and Silver) Values

In times of grave monetary troubles, the use of gold clauses may give rise to a general custom of accounting in gold (or silver) value units which are distinct from the actual monetary unit. This phenomenon has a long history.⁴⁸ By mercantile custom of the 16th and 17th centuries, drafts on and from the great Italian fairs were made in terms of *scuti marcharum* (*scudi di marche*), the *scutus* representing a definite quantity of fine gold, namely, 1/65th of a *marcha*, a weight equal to about 234 grams.⁴⁹ Payment was made in current coin, particularly Venetian and other *scuti aurei*, in a ratio determined not by governmental fiat but by mercantile agencies. Similar usages existed in other countries.⁵⁰

This scheme was considerably improved when in 1770 the *Hamburger Girobank* (1617-1873), adopting an earlier Dutch device,⁵¹ created the *mark-banco*.⁵² A person depositing silver

⁴⁵ Decree of April 17, 1924, *R.G.Bl.* 1924 I 414.

⁴⁶ *Supra*, p. 253, n. 17.

⁴⁷ Italian Civil Code 1823; Spanish Civil Code 1754 (2); Dutch Civil Code 1795.

⁴⁸ Goldschmidt, *Handbuch des Handelsrechts* (1868) 1183, n. 16; *idem*, *Universalgeschichte des Handelsrechts* (1891) 312, n. 53; 1 Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre* (1874) 182.

⁴⁹ Goldschmidt, *Handbuch* (1868) 1083. The Italian *marcha* was of German origin.

⁵⁰ In Germany the *pagament* of Cologne was the counterpart of the Italian *scudo di marche*. See von Inama-Sternegg, *Deutsche Wirtschaftsgeschichte*, part 2 (1901) 386. Units of this kind are sometimes called *moneta imaginaria*, but this term should be reserved for the phenomenon discussed *supra*, p. 10. Regarding colonial "proclamation money", see *supra*, p. 166.

⁵¹ The *Amsterdam'sche Wisselbank* founded in 1609 was described by Adam Smith, *Wealth of Nations* (1776), book IV, ch. 3, part 1, digression. See also Van Dillen, *History of the Principal Public Banks* (The Hague 1934) 79.

⁵² See Goldschmidt, *Handbuch des Handelsrechts* (1868) 1179 n. 8 *et seq.*; 1 Sombart, *Der moderne Kapitalismus* (3d ed., 1921) 424; Knapp, *The State Theory of Money* (1924) 145; Ernst Levy von Halle, *Die Ham-*

with the bank was credited in *marks-banco*, one *mark-banco* being equivalent to about 8.43 grams of silver. The bank thus became obligated not in terms of a monetary unit, but in terms of a weight unit which was independent of the multiplicity and the irregularities of the circulating monetary media of payment. The silver, received by the customers, constituted the foundation for the *mark-banco* credits.⁵³ The customers were entitled to utilize their accounts by receiving silver from the bank or by directing the bank to deliver silver to third persons. There were no "checks" of the modern type, but, as between customers, ledger transfers were possible. Accounting in terms of *marks-banco* was customary in important business transactions. In every-day life money was employed in the usual way, the monetary unit being the "Hamburg mark" as distinguished from the *mark-banco*.⁵⁴

The *mark-banco* was neither represented by a coin nor by paper money. It was a measure of certain choses in action, viz. of claims against the *Hamburger Girobank* or against persons who had expressly stipulated in terms of *mark-banco*. The *mark-banco* therefore was not, strictly speaking, money proper, although it was frequently labeled "bank-money".⁵⁵

burger Girobank (1891); Sieveking, "Die Hamburger Bank", in Van Dillen, *op. cit.* in preceding note at 125; Jastrow, *Die Prinzipienfragen in den Aufwertungsdebatten* (Brunn, 1937) 44. Data may also be found in 1 Palgrave, *Dictionary of Political Economy* (1926) 105.

It seems not to be generally known that in modern China there has been a copy of the *mark-banco*, the Newchwang "transfer money", see Morse, "Currency in China", (1907) 38 *Journal of the North China Branch of the Royal Asiatic Society* 1 at 52.

⁵³ The silver was kept by the bank in its vaults at the disposal of its customers. Where title to the silver resided is not clear. A reference to the existing legal controversies is found in *von Halle, op. cit.*, at 27. Probably the bank was the owner of the silver, subject to a personal obligation to restore to the deliverer of the silver, or to his order, the same quantity received (on the theory of a "depositum irregulare") and to keep the silver ready at any time for disposal by the customer.

⁵⁴ In the American Act of July 31, 1789, "to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, etc." 1 Stat. 29 at 41, sec. 18, it is provided that among other "coins and currencies", "each *mark Banco* of Hamburg" shall be estimated at 33½ cents. This does not refer to payments to be made in the American port, but to the amounts indicated in the invoices of imported goods.

In the German *Wechselordnung* of 1849, as amended June 3, 1908 (*R.G.Bl.* 1908, 327), art. 37, the *banco*-unit was referred to as *Rechnungswährung* which may be approximately translated as "currency of account". The reference has been omitted in the present German *Wechselgesetz* of June 21, 1933 (*R.G.Bl.* 1933 I 399), which rests on the Uniform Bill of Exchange Act drafted by the League of Nations in 1931.

⁵⁵ A terminology employed also by Adam Smith, *supra*, n. 51.

The question of the legal nature of the *mark-banco* was presented early in the 70's when the new German monetary system, based on the gold "mark", was created. Provision was made for conversion into the new Reich currency of existing debts payable in State currencies (Prussian, Bavarian and so on).⁵⁶ The Reich government refused, however, to fix a statutory ratio between the *mark-banco* and the new German mark. In the opinion of the government the *mark-banco* was not money and was therefore not convertible. Conversion of the *mark-banco*, so ran the plausible argument, would in practice mean fixing the price of silver by law, which there had been no intention whatever of doing.⁵⁷

Another type of accounting in units of metal value developed during the last phases of the German post-war inflation. The more the German monetary unit, the mark, decayed, the more people calculated in "gold-marks", meaning the value of $1/2790^{1/10}$ grams of fine gold, defined by the Coinage Law as a mark. No gold coins circulated in Germany, however; payment of gold-mark debts was to be made in currency according to the fluctuating market price of gold. At variance with the Hamburg *mark-banco* the post-war gold mark was not backed by a central bank operating on the basis of the accounting unit and possessing the necessary metal reserves. No gold was available in sufficient amounts, and therefore banks ordinarily refused to conduct accounts in gold marks because of the intolerable risk involved.

Again, the gold mark could not be spoken of as a monetary unit. It was a mere accounting unit invented to secure to the creditor a value independent of the fluctuations of money. There was only one monetary unit, the "mark" and in and after 1924 the new "reichsmark".⁵⁸ The term "paper

⁵⁶ Law of Dec. 4, 1871, *R.G.Bl.* 1871, 404, sec. 8.

⁵⁷ See 1 Helfferich, *Die Reform des Deutschen Geldwesens* (1898) 198; E. L. v. Halle, *op. cit. supra*, n. 52, at 43, 53. Knapp, *The State Theory of Money* (1924) 146, points out that silver stored in the vaults of the *Girobank* and employed for creating *mark-banco* accounts was no longer silver as such, but from a legal angle modified like gold by the process of coinage. This is erroneous. Only by coinage, a new thing, a veritable money comes into existence. The case of the silver in the vaults of the *Girobank* was wholly different.

⁵⁸ Coinage Law of June 1, 1909, *R.G.Bl.* 1909, 507; (new) Coinage Law of Aug. 30, 1924, *ibid.*, 1924 II 254. Lord Sterndale's statement in *Chesterman's Trusts-Mott v. Browning*, [1923] 2 Ch. 466 at 478 (C.A., 1923). "There is no such thing as a gold-mark" was accurate.

mark" although sometimes loosely used by courts⁵⁹ is never found in statutory language. The gold mark, however, was adopted and elaborated upon by statute. The latter created several types of gold marks, one based on London gold-market quotations ("fine-gold mark") and another on dollar quotations ("dollar gold mark").⁶⁰ After the stabilization of the mark detailed regulations were issued for conversion from marks to the dollar-gold mark in commercial accounting.⁶¹

Devices similar to the gold mark were used in Austria, Hungary and Poland.⁶² Recent developments have rendered these accounting devices more or less ineffective.⁶³

SECTION 26

IMPLIED AND SHAM GOLD CLAUSES

I. *Evidential Basis of Gold Clauses*

A gold clause obligation may be evidenced independently of the instrument containing the promise to pay. When, for instance, in the case of a bond loan, payment in gold is promised merely in the prospectus preceding or accompanying the subscription and issuance of the loan, it has been repeatedly held that a binding gold clause is created by the subscription which constitutes an acceptance of the promise.¹ This cer-

⁵⁹ For an American example, see *Re Illfelder's Estate*, 136 Misc. 430, at 431, 240 N.Y. Supp. 413 at 415 (1930).

⁶⁰ *Infra*, p. 324, n. 40, and p. 331. There were still other varieties and manifold shadings of gold clauses. See Supreme Court of Bavaria, March 7, 1929, *J.W.* 1929, 3022, and Nussbaum, *Das Geld* (1925) 103.

⁶¹ The ordinance on "gold balance sheets" (*Goldbilanzverordnung*) of Dec. 28, 1923, *R.G.Bl.* 1923 I 1253, was basic. Many supplementary and executive decrees followed. See Quassowski, *Goldbilanzverordnung* (1924).

Touching the literature on stabilized accounting, see *supra*, p. 255, n. 31.

⁶² Lengthy statutes providing for the restriction and regulation of "gold-crown" and "gold-pengö" debts were enacted in Austria and Hungary, *infra*, sec. 29, n. 16; sec. 26, n. 32.

⁶³ *Infra*, sec. 29 I. Regarding the "gold franc" accounting of the Universal Postal Union, see *infra*, sec. 30, n. 87.

¹ Permanent Court of International Justice, *Series A*, Nos. 20/21, Judgment No. 14, *J.D.Int.* 1929, 977 at 1018, in the case of the Brazilian loan of 1909; French *Cour de Cassation*, July 9, 1930, *J.D.Int.* 1931, 124, in the case of the loan of the *Société du Port de Rosario*; same Court Jan. (Feb.?) 14, 1934, *J.D.Int.* 1934, 1202, in the case of the *Banque Hypothécaire Franco-Argentine*; same court Jan. 20, 1936, *D.H.*

tainly is sound since the market is ordinarily built up on the prospectus.

The French *Cour de Cassation*, has, however, gone further. Before the War, a Brazilian corporation, the *Compagnie de Chemin de Fer de Sao Paulo à Rio Grande*, had floated a bonded loan in France. While the stockholders' meeting of the Railroad company had authorized a loan in terms of francs, bearing "interest of 5% gold", the bonds and coupons were actually couched in "francs". As is usual, reference was made in the bond to the resolution of the meeting duly published in the Brazilian official journal authorizing the issue. Apparently the directors did not exercise, and were under no duty to exercise, all the powers conferred on them by the resolution of the stockholders. It would seem to be clear that an authorization of the board does not necessarily amount to a contract binding the corporation. That is the law of France,² and presumably the law of every country when there is a developed corporation law.³ The French *Cour de Cassation*,⁴ however, read a gold clause into the general reference of the bond, to the stockholders' resolution. This adjudication is not without other interest. An action had also been instituted by another bondholder of the loan. The latter's attorneys had apparently not perceived the possibilities in the stockholders' resolution, or else had for good reasons considered it irrelevant. In proceedings before the *Cour de Cassation*, under a rule in force in other jurisdictions also, only such facts may be alleged as have been pleaded in the lower

1936, 113, in the case of the *Cie. des Chemins de Fer de Porto Rico*, an American (previously Spanish) corporation; Swiss Federal Tribunal May 23, 1928, *Ämtliche Sammlung der Entscheidungen* 54 II 257 and *J.D.Int.* 1929, 497, regarding a loan of the *Crédit Foncier Franco-Canadien*; *Reichsgericht*, Nov. 12, 1934, *J.W.* 1935, 189. In the *Rosario* case the subscription forms, too, contained a reference to gold in these terms: "Emprunt 5%, 1908 . . . Emission de 80,000 obligations de 500 francs, 5% or . . ." The Court not only used a prospectus theory but also extended the gold clause which did not appear in the bonds to principal. See, however, *supra*, p. 304, n. 15.

² See 2 Houpin-Bosvieux, *Traité Théorique et Pratique des Sociétés Civiles and Commerciales* (7th ed., 1935), no. 1227.

³ See, e.g., *Cook Corporations* (8th ed., 1923), sec. 709. As to German law, see *Corporation Law* (1937), sec. 71 (former sec. 231 of the Commercial Code); [the *Vorstand* represents the corporation, the resolutions of the stockholders' meeting having only an internal significance].

⁴ Judgments of Jan. 24, 1934, *D.P.* 1934 I 73 at 77. There is again an extension, entirely unsubstantiated in this case, of the gold clause from interest to principal.

courts. The result was that while the claims for gold payment were identical, one was allowed and the other was not.

A reference to gold, not contained in the contract itself, will sometimes be found in documents coming from the prospective *creditor*. In post-war business practice, particularly in Germany and Austria, the seller of goods frequently used invoice forms containing the following recital "price payable in gold marks" or "gold schillings" respectively. The general doctrines of offer-and-acceptance determine under what circumstances such provisions become part of the contract. The one-sided insertion of the recital in the invoice is, of course, legally ineffective. An Austrian decree of April 26, 1933,⁵ having the force of law expressly states that acceptance without protest of such an invoice does not amount to a promise of payment in gold or in gold value. This rule seems to be sound.

II. *Implied Gold Clauses*

It is not necessary that a gold clause be expressed in terms of gold. For instance, a stipulation for payment "in specie" or in "*klingender Münze*"⁶ is a gold clause if, at the time of payment, gold coins (or notes redeemable in gold) are the only unlimited legal tender. Similarly, if under a "limping gold standard"⁷ silver coins are likewise unlimited legal tender, the stipulation is tantamount to an alternative gold-silver clause.

In an Italian case a testator made a bequest in lire, the bequest to be increased or decreased in proportion to the decrease or increase of the lire. This was correctly held to be a gold (-value) clause rather than a reference to the fluctuations of the purchasing power of the lire.⁸ In a case involv-

⁵ *Bundesgesetzblatt* 1933 no. 149.

⁶ *Supra*, p. 303, n. 11. The term "pound sterling" does not connote a gold clause. *Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co.*, 10 Lloyds L.R. 703 (H. of L., 1922).

In an old Italian rural lease payment of tithes had been stipulated in terms of silver "*scudi*" or gold. When the silver *scudi* went out of circulation the proviso was reduced to a gold clause. Italian Court of Cassation, March 2, 1937, *La Settimana della Cassazione* 1937, 466.

⁷ *Supra*, p. 140.

⁸ Appellate Court of Milan, Dec. 26, 1935, *R.D. Comm.* 1936 II 386 at 403. Similarly, Court of Viterbo, Oct. 26, 1935, *Foro Italiano* 1936 I 872 [annuity contract providing for readjustment of the annuities "according to market conditions on the basis of the gold lire"]. Less convincing is Court of Torino, May 22, 1934, *R.D. Comm.* 1935 II 531 at

ing foreign creditors a French court⁹ ruled incorrectly that the following clause contained in a mortgage on real property in Alsace-Lorraine made while that territory was part of Germany was not a gold clause. The clause read: "Payable in good specie (*bonnes espèces*) of German currency".¹⁰ Since the only unlimited legal tender coins in Germany were gold coins it is clear that the foregoing provision was a gold clause; as construed by the court it was rendered devoid of any legal relevance.

More significant than contractual "in specie" provisions are attempts to spell out gold clauses from extrinsic circumstances in the absence of contractual reference, direct or indirect, to gold or gold parity. In cases of contracts for the payment of a definite sum entered into while money is stable, e.g., dollars before the Civil War, it is not surprising that when an unexpected depreciation occurs creditors should urge the courts to interpret the obligation to pay in terms of the gold value of the time of contracting. This type of tacit gold-clause theory obviously comes very close to revaluation and was rather suggested in *Willard v. Tayloe*.¹¹ It was, however, definitely rejected in *Maryland v. Baltimore and Ohio R. Co.*¹² That case involved a contract, made in 1839, between the State of Maryland and the railroad company and guaranteeing the state a certain return upon its investment in the road. The Supreme Court held, in a forceful opinion by Mr. Justice Strong, that Maryland was merely entitled to receive current dollars since the possible expectation of the creditor and the anticipation of the debtor that payment would be made in coin did not amount to a contractual obligation. This view¹³

569, considering as a gold clause a reference to pounds sterling which was combined with a wholesale index, the amount to be paid to be calculated on a middle ground between pound and index. See also Appellate Court of Brussels, March 9, 1935, *La Belgique Judiciaire* 1935, 339 [rent in francs at a rate of 35 = 1 dollar or "*à défaut du dollar*", at a rate of 173 = 1 pound; construed by the Court as a gold value clause].

⁹ *Cour de Cassation*, Jan. 11, 1926, *J.D.Int.* 1926, 441.

¹⁰ This is translated from the French translation. The original German phrase is not indicated in the cases.

¹¹ 8 Wall. (75 U.S.) 557 (1869), *supra*, p. 263.

¹² 22 Wall. (89 U.S.) 105 (1874). A tacit gold clause had been recognized in *Spencer v. Prindle*, 28 Cal. 276 (1865), a case reflecting the particular conditions prevailing in California.

¹³ It was recently presented in a particularly impressive way by the Privy Council in *Ottoman Bk. of Nicosia v. Chakarian*, [1938] A.C.

has been adopted by the courts of almost all countries even where there was stronger evidence of the existence of a gold clause. Thus a gold clause has not been implied where the debtor gave guarantees in terms of gold¹⁴ or even where the parties to a contract, because of the instability of their domestic currency or currencies, had stipulated that payment should be in terms of a foreign currency since the latter was particularly steady, as pounds before 1931, dollars before 1933. A person who contracts in terms of a foreign currency subjects his contractual rights and duties to the vicissitudes of that currency. This rule, basic to the legal treatment of foreign-currency obligations, is also decisive in the present situation; where the foreign-currency creditor, for whatever reason, is not safeguarded by an express gold clause, it is not for the courts to supply the omission under the pretext of interpreting the contract.¹⁵

260 (Privy Council, 1937); same, *Sforza v. Ottoman Bk. of Nicosia*, [1938] A.C. 282 (Privy Council, 1937). See also the cases cited in n. 14 and 15, *infra*.

¹⁴ French *Cour de Cassation*, Jan. 24, 1934, *D.P.* 1934 I 73 at 77, concerning the loan of the Brazilian *Compagnie de Chemin de Fer de Sao Paulo à Rio Grande* (first case). The Brazilian Government had undertaken, on behalf of the company, a guarantee in terms of kilometers and of gold. The reference to this guarantee in the prospectus of the loan was held irrelevant by the Court. Similarly, *Cour de Cassation*, Nov. 5, 1934, *J.D.Int.* 1936, 177 (guarantee of Moroccan loan by gold customs held not to amount to a gold clause), and July 21, 1936, *J.D.Int.* 1937, 299, in the case of the *Papeteries de France* (dictum). In the case of the pre-war loans of the *Banque Hypothécaire Franco-Argentine* (a French company), a different result was reached since the prospectus besides mentioning the "Argentine gold" mortgages underlying the loan had added that the bondholders would thereby be protected from the fluctuations of the rate of exchange, *Cour de Cassation*, Jan. (Feb.?) 14, 1934, *J.D.Int.* 1934, 1202. (The case was criticized by Trotabas, *D.P.* 1934 I 74.)

In *Reichsgericht*, Oct. 2, 1935, *R.G.Z.* 149, 1, a dollar-debt apparently between Germans, was secured by a "gold"-mortgage on German real estate. The Court held that through the mortgage deed the debt, too, had been converted into a gold debt. However, in the case of a pound loan of the State of Hamburg the *Reichsgericht* rejected the theory of a tacit gold clause although the prospectus had stated the revenues of Hamburg as well as the total of interest in terms of gold. The gold value of the English pound had also been referred to in the prospectus. Judgment of February 7, 1938, *J.W.* 1938, 1109. To be sure, no security proper was involved here, but the statements mentioned strongly indicated the existence of a gold clause. The theory of the 1935 judgment seems to have been abandoned in the judgment of March 7, 1938, *infra*, p. 323, n. 39.

¹⁵ See French *Cour de Cassation*, Jan. 14, 1931, *J.D.Int.* 1931, 126 (loan of the City of Tokyo); Italian Court of Cassation, Jan. 10, 1936, *R.D. Comm.* 1936 II 386 (the amount of lire to be paid was measured, by the contract, in English pounds on a ratio which was the gold parity at the time of contracting); Dutch Supreme Court (*Hooge Raad*)

The foregoing observations, however, must be qualified in respect to a few jurisdictions. There is first the minority doctrine under which in "international contracts" the franc must be understood as the franc of the Latin Monetary Union, i.e., the gold franc.¹⁶ Even apart from the Union treaty, references in international documents to francs have repeatedly been interpreted to mean gold francs. In the case of the *Compagnie Universelle du Canal Maritime de Suez*, a French foundation with its principal domicile in Paris, the franchise granted to the Compagnie in 1856 by the Egyptian government, provided that rates for passage of the Canal were to be paid in francs. The Appellate Court of Paris held that gold francs were meant.¹⁷ When, however, the holders of franc bonds issued by the company before the World War demanded payment in gold francs, their suit was dismissed by the *Tribunal de la Seine*, although the bonds were worded in several languages and were payable in various countries.¹⁸ This inconsistency has been denounced by French writers.¹⁹

In cases involving various franc loans of Egyptian companies and private debtors, the course of the Appellate Court of Paris was followed by the Egyptian Mixed Tribunals,²⁰

Jan. 2, 1931, *Nederland'sche Jurisprudentie*, 1931, 274; Appellate Court of Leeuwarden, Nov. 21, 1934, *Nederland'sche Jurisprudentie*, 1935, 333; Appellate Court of Brussels, March 15, 1933, *J.D.Int.* 1933, 722 at 724 [*contra*, on special factual grounds, App. Court of Liège, Feb. 17, 1936, *Pasicrisie Belge*, 1937 III 34]; Appellate Court of Vienna, June 11, 1932, *J.W.* 1932, 3840; Alberta Supreme Court, App. Div., in *Brown v. Alberta and Great Waterways Railway*, 59 D.L.R. 520 (1921); several awards emanating from various arbitrators of the International Chamber of Commerce, *World Trade* (Paris) 1932, No. 9, p. 10; n. 11, p. 11; 1933, no. 2, p. 10; no. 5, p. 11; Hamburg awards in *Hanseatische Rechts- und Gerichtszeitschrift*, 1932 B 234 and 591; 1937 B 98. See also Supreme Court of Austria May 5, 1932, *Die Rechtsprechung*, 1933, 109. The attitude of the Dantzig courts after the 1931 collapse of the English pound was different because of the tie-up of the Dantzig guilder with the original pound; see the cases in *Z.A.I.P.*, 1933, 902. A dollar clause in a Czechoslovakian lease was construed as a gold clause by the Supreme Court of Czechoslovakia Feb. 4, 1938, *Prager Juristische Zeitschrift*, 1938, 331.

¹⁶ *Supra*, p. 155, n. 9.

¹⁷ Judgment of Feb. 15, 1924, *J.D.Int.* 1924, 688. The Appellate Court of Brussels, Oct. 2, 1926, *Revue du Droit Bancaire* 1927, 316, construing an international pre-war agreement on losses of goods in international railway transport, likewise held that the francs stipulated in the agreement were pre-war, hence gold francs. Still, in this case, the Belgian government was the losing party. See, furthermore, the cases discussed *infra*, sec. 35 at n. 65-69.

¹⁸ *Trib. civil de la Seine*, April 1, 1925, *J.D.Int.* 1925, 1023.

¹⁹ See Mestre and James, *La Clause-Or* (1926) 106.

²⁰ Appellate Court of Alexandria, April 7, 1927, *Revue du Droit Bancaire* 1928, 357 (loan of the *Société Anonyme des Chemins de Fer de*

which usually leant closely on French legal doctrine. The Egyptian courts, however, had an adequate ground for construing the loans as gold debts because the French gold franc had been incorporated before the time of contracting into the Egyptian monetary system as an "extraneous element"²¹ in a definite ratio to the Egyptian monetary unit (the piastre). This argument together with the international-franc theory was applied by the Egyptian courts to the *Suez Compagnie*²² which also had a business domicile in Cairo. The *Compagnie* was thus forced to pay the gold amount despite the protective Paris judgment.

The German courts were also repeatedly confronted with the problem of the tacit gold clause. In many cases German parties had contracted for payment in English pounds or in dollars, in the belief that these currencies would offer entire security against depreciation. What happened, however, was that these currencies declined while the mark remained stable. At first German courts correctly denied the existence of a tacit gold clause in such a situation. Thus a plain and clear "pound-for-pound" or "dollar-for-dollar" rule was laid down.²³

la Basse Egypte); May 19, 1927, *J.D.Int.* 1928, 765 (mortgage transaction between non-corporate individuals); April 12, 1928, *J.D.Int.* 1928, 777 (loan of the *Caisse Hypothécaire d'Egypte*). Indeed, earlier judgments, on somewhat different facts, applied a "franc-for-franc" ruling. Appellate Court of Alexandria, Nov. 12 and Nov. 26, 1924, *J.D.Int.* 1926, 206, 207 (life insurance by the French company *La Foncière*); March 10, 1926, *Revue du Droit Bancaire* 1927, 368 (life insurance by the German company *Victoria*).

The Egyptian Mixed Tribunals were instituted in 1876, by international treaties, the majority of the judges consisting of nations of the various foreign Powers. Special Codes based on French law were worked out for them. See Brinton, *The Mixed Courts of Egypt* (1930); 1 *Rechtsvergleichendes Handwörterbuch* 499. Under the Treaty of Montreux (1937), which established Egypt's sovereignty, the Mixed Courts will be dissolved in 1949, *Command Papers* (1937) 5491; *J.D.Int.* 1937, 1017.

²¹ *Supra*, p. 135.

²² Appellate Court of Alexandria, June 4, 1925, *Revue du Droit Bancaire* 1925, 505. See also same court, June 18, 1931, *J.D.Int.* 1932, 202 at 207 (dividends and *intérêt statutaire* of the companies' stock payable in gold). An Egyptian decree of May 2, 1935, *infra*, sec. 28, n. 79, had abrogated gold clauses purporting "international payments", provided payment was to be made in Egyptian money or in money that had previously been legal tender in Egypt. It was held that this rule did not apply to the "international franc" used by the Suez Company, Civil Tribunal of Cairo of Jan. 3, 1938, *Journal des Tribunaux Mixtes* of Jan. 12/13, 1938, p. 7.

²³ E.g., by Appellate Court of Hamburg, June 14, 1932, quoted in note *Hanseatische Rechts-und Gerichtszeitschrift* 1932 B 593; Appellate Court of Hamm, Feb. 16, 1933, *J.W.* 1933, 1267. The same princi-

This ruling was, after some vacillation,²⁴ readopted in 1937.²⁵ The law, however, had become hopelessly confused by the "re-valuation" and "readjustment" theories,²⁶ and finally by the law on foreign devaluation of 1936.²⁷

III. *Sham Gold Clauses*

While spelling gold clauses from the terms of the contract or from extrinsic circumstances is entirely within the lines of common legal technique, there is sometimes a surprising failure to give effect to a gold clause even where the parties have expressed the sum to be paid in gold. Instances of this can be traced back to the sixteenth century and probably go back even earlier. Thus, a sixteenth century French contract for payment of one hundred *ducati auri* could be discharged by other coins, equivalent *in law* to the *ducati*. To escape the application of this rule and secure payment in real gold coin the formula *auri et de auro* was added after the name of the coin.²⁸ That venerable practice has a modern counterpart in the occasional association by law or by custom of the name of a new unit of a monetary system reorganized on a gold basis with the term, gold. This happened in Russia when in 1890 the rouble was shifted from a silver to a gold basis. In commercial parlance the new rouble was called "gold rouble".²⁹ In Argentina a "gold peso" was created in 1899 for the convenience of foreign trade, forty-four gold pesos being equal by law to one hundred paper pesos. This gold peso, although at times at par, fluctuated considerably in terms of gold.³⁰ Again, the new monetary unit issued by

ple underlies the *Reichsgericht's* judgments of June 21, 1933, *R.G.Z.* 141, 212; June 28, 1934, *ibid.*, 145, 51; April 2, 1935, *ibid.*, 147, 286. See also Gruber, *Pfund und Dollar* (1935).

²⁴ Judgment of Dec. 14, 1934, *R.G.Z.* 146, 1 [promise of reichsmarks "on a firm dollar basis" of 10/42 as "goldmark"]; of Jan. 2, 1935, 34 *Bankarchiv* 460 [a tacit gold clause was read into a pound contract on the ground that the parties in choosing the English currency had intended to obtain a consideration stable in value (*wertbeständig*)].

²⁵ Judgments of May 28, 1937, *R.G.Z.* 155, 133 and *J.W.* 1937, 2823. See also *supra*, p. 317, n. 14, and *infra*, p. 323, n. 39.

²⁶ *Supra*, p. 292.

²⁷ *Infra*, p. 295, n. 58.

²⁸ See Taeuber, *Geld und Kredit im Mittelalter* (1933) 296 n. 864. For instances of early gold clauses, see *supra*, p. 302.

²⁹ Swoboda-Wagon, *Die Arbitrage* (17th ed., 1928) 491.

³⁰ The highest court of Argentina, in a number of judgments from 1923 to 1926, has held Argentine provinces liable to pay "gold pesos",

the Soviet Government in 1924 was commonly spoken of as a "gold rouble", although that appellation had no other basis than the legal ratio adopted.³¹ There are other examples.³² It is evident that reference in the contract to the new gold dubbed unit does not amount to a gold clause, and that therefore no protection is offered to the creditor against depreciation of such "gold" units.³³ In that situation an effective gold clause protection would have to be framed in terms specifically fixing the weight and fineness of the gold coins to be paid.

All these instances are exceptional, however, and must be interpreted in the light of the history of the monetary unit in question.³⁴ They offer no basis for interpreting away

in the sense indicated, on their foreign loans couched in terms of gold pesos. The leading case is *Luchinetti v. Province of Mendoza*, Sept. 17, 1923, 138 *Fallos de la Suprema Corte Nacional* 402. It has frequently been referred to as an authority for the protection of gold clauses but that is erroneous. Appellate Court of Paris, July 3, 1930, *D.P.* 1934 I 78, citing Appellate Court of Buenos Aires United Divisions, April 20, 1917, and Sept. 3, 1918, shows clearly that the gold peso creditor was not entitled to gold. See also Supreme Court of Argentine, Aug. 9, 1917, 125 *Fallos de la Suprema Corte Nacional*, 411 in *Banco Hypothecario Franco-Argentino v. Cozón*. The ratio of 44 gold pesos equal 100 paper pesos reappears in the law of March 28, 1935, No. 12160. For general information, see Cuneo, *Banking and Currency in Argentina* (1932), and as to later developments, 1935 Federal Reserve Bulletin 449.

³¹ See, e.g., Hubbard, *Soviet Money and Finance* (1936) 42, 43.

³² In 1931 Hungary dubbed its new monetary unit "gold pengő". Decrees no. 4560/1931 and no. 4600/1931 of Aug. 15, 1931, and Aug. 28, 1931. *Das Devisenrecht der Welt* (1932) 93.

³³ In addition to the Argentine cases (n. 30), see Greek-Bulgarian Mixed Arbitral Tribunal, judgment of June 11, 1926, 6 *Recueil des Décisions des Tribunaux Mixtes* 321 (a case involving Bulgarian "gold leva"). The Swedish government in a parliamentary paper advocating legislative invalidation of "gold-crown" stipulations declared that from Sweden's transition to the gold standard in 1873, the "crown", unit of the new gold standard, had customarily been called "gold crown" with no connotation of a gold clause. In this connection the government pointed out that certain Swedish bonds, partly calling for payment in crowns and partly for payment in gold crowns, had been marketed at practically the same value. Printings of the Swedish *Riksdag* (1932), no. 264.

³⁴ A doubtful situation arose in the case of the pre-war bonds of the Turkish *Société d'Heraklee*, which called for payment of Turkish "gold piaster". Swiss Federal Tribunal, Feb. 11, 1931, *Amtliche Sammlung* 57 II 69; *J.D.Int.* 1931, 510. The company alleged in defense that the "gold piaster" was only a "money of account". By this allegation the company apparently meant that this "money of account" had depreciated, because despite its name it was in reality no longer on the gold parity prescribed by law. The unfortunate wording of the defense led the court into an involved theoretical discussion of "money of account" which, the court pointed out, might be a monetary denomination not actually represented by a coin, such as the English guinea. The court then turned to a second meaning of the word, which it called "money

a reference to gold under ordinary circumstances.³⁵ That was done, however, in the case of a loan of one million marks "payable in gold", raised by the city of Karlsbad in 1896 from German subscribers. The Supreme Court of Czechoslovakia eliminated this undeniable gold clause. While conceding that the provision quoted might be a gold clause, the Court observed that the parties may merely have intended to indicate by it the gold-standard quality of the mark without seeking to give their words any special legal effect. In case of doubt the interpretation more favorable to the debtor

of contract" as distinguished from "real money" ("*monnaie effective*"). The court took the former term to cover the "ideal unit". ["Money of contract" has another significance, however, see *infra*, sec. 33 I.] The court then argued that if the ideal unit (gold piaster) coincides with the "real money the standard of which is gold", the promise to pay gold piaster must be construed as referring to the latter. By "real money" the court meant the Turkish gold coins representing a multiple of a gold piaster. The existence of such gold coin does not disprove the allegation that the so-called gold piaster had depreciated; *e.g.*, in the case of the Argentine gold peso and the Bulgarian gold leva gold coins representing those units were in existence. See Tate, *Modern Cambist* (28th ed., 1929) 575, 111. However, the court's holding is correct since in case of doubt the reference to gold must be interpreted as a gold clause, and the company's allegations as to the meaning of "gold piaster" were probably unfounded. The fact that the Turkish government had invalidated the gold clauses (*infra*, sec. 29, n. 5) seems not to have been pleaded by the defendant. The case illustrates the legal difficulties inherent in monetary matters.

The French courts, concerned with the same bonds, merely relied on the word "gold" without bothering about the problem involved. *Cour de Cassation*, July 7, 1931, *J.D.Int.* 1932, 403 at 416; Appellate Court of Paris, March 23, 1928, *J.D.Int.* 1928, 698; Appellate Court of Amiens, Jan. 27, 1932, *Sirey* 1932 II 158.

³⁵ In the case of the Serbian and Brazilian loans, *supra*, p. 380, n. 6, the Permanent Court of International Justice correctly rejected the attempts of the defendant governments to throw overboard the payment-in-gold-francs clause by interpreting "gold franc" in the sense of "French franc". *J.D.Int.* 1929, 977 at 995. Elimination of a true gold clause, so to speak with a most honest intent, was accomplished in *Woodruff v. Mississippi*, 162 U.S. 291 (1895), *supra*, p. 304, n. 15. The bonds issued by the Mississippi Board acknowledged a principal indebtedness in gold coin, but the Supreme Court denied that this was a gold clause for the obscure reason that "the designated sums did not specify any particular kind of money". Although the dollar was then at par, the board sought to escape payment on the ground that it was given no power by the Mississippi laws to obligate itself in terms of gold. This shocking defense, sustained by the highest Mississippi Court, was overruled by the Court. Probably the rule that the interpretation of State statutes by the highest state court is binding upon the Supreme Court stood in the way of a sound construction of the Mississippi law by the Federal court, *cf. Supreme Lodge, Knights of Pythias v. Meyer*, 265 U.S. 30 (1924). That the power to borrow includes the power to promise payment in gold was affirmed in *Moore v. City of Walla Walla*, 60 Fed. 961 (C.C.D. Wash., 1894); *Farson, Leach & Co. v. Sinking Fund*, 97 Ky. 119, 30 S.W. 17 (1895), and with an eye to negotiable instruments, in *Judson v. City of Bessemer*, 87 Ala. 240, 6 So. 267 (1889).

should be applied.³⁶ The court seems to have been influenced by a desire to protect its own nationals.³⁷ Judgments of this kind have also been rendered by other courts, including common law courts.³⁸

Another objectionable device was recently employed by the *Reichsgericht* to the prejudice of a Swiss mortgage creditor and in favor of a German mortgagee. In that case the mortgage was given to secure a pre-existing debt calling for payment of French francs. The mortgage deed and the debenture, executed in 1928 and 1929, stated the debt in gold marks, however. The *Reichsgericht*, remanding the case to the Appellate Court, suggested that only French francs were owed. The judgment appealed from, the *Reichsgericht* pointed out, did not indicate "economic reasons" for the substitution of gold marks for francs.³⁹ Whatever the economic

³⁶ Judgment of March 17, 1927, *Zeitschrift für Ostrecht*, 1928, 1208 at 1209. The same rule was applied in favor of nationalized (previously foreign) Czechoslovakian insurance companies indebted on gold mark insurances. Judgment of Dec. 21, 1935, *Zeitschrift für Osteuropäisches Recht* (New Series) 1936, 339, annotated by Wahle. Compare also the Norwegian judgment discussed *infra*, sec. 30, n. 76.

³⁷ The practical effect, in these cases, is to hold existing clauses void or else ineffective. Legally, of course, the question of invalidity is entirely different. See *infra*, sec. 28 V.

³⁸ *Modiano Brothers & Son v. Bailey & Sons*, 47 Lloyds L.R. 134 (K.B., 1933). A *c.i.f.* contract on a London Corn Exchange form contained this clause "Freight collect on basis of £ equal to 4.85 U. S. gold dollars, shipowners to have option of collecting U. S. dollars or their own country's currency at ruling rate of exchange for U. S. gold dollar". The creditor was Belgian, the debtor English. The court told the parties that "gold dollar" meant nothing but "dollar". There were no particular facts supporting this construction. In *Derwa v. Rio de Janeiro Tramway, Light & Power Co.* (a Canadian corporation), [1928] 4 D.L.R. 542, the Supreme Court of Ontario held that the bonds of the defendant, phrased in French "*obligation 500 fr. 5% or . . .*" and described in the prospectus as "gold bonds" were not gold bonds because no gold clause was attached to the promise to pay. *St. Pierre v. South American Stores (Gath & Chaves)*, [1937] 3 All E.R. 349 (C.A., 1937), is of a different nature. A clause in a Chilean lease to pay X "pesos of 183.057 millionth of a gram of fine gold" was declared to be a promise to pay X pesos only, because Chilean law, as settled by numerous decisions of Chilean lower courts, required this interpretation. Astounding as the interpretation is, the Court was bound by it under the law of evidence. These Chilean cases were, however, overruled by the Chilean Supreme Court, Jan. 8, 1938. See 1 *Comparative Law Series* (U.S. Dept. of Commerce) New Series 84.

Recently the Supreme Court of Sweden has joined the group of sham-gold-clause discoverers. Bonds of an 1885 loan of the *City of Stockholm* called for payment in *kronors* or marks, "in gold", but the Court maintained that this constituted a reference to monetary conditions existing at the time of the issue, rather than a gold clause. Judgment of June 10, 1938, Bull. I.I.I. 39, 108. The case did not come under the law of June 17, 1932, *infra*, p. 358, n. 5. See also *supra*, n. 33.

³⁹ Judgment of March 7, 1938, *J.W.* 1938, 1391.

motivation of the parties, they had stipulated unambiguously for payment in gold, and this should have been recognized by the Court.

IV. Devaluation of the Gold Unit Contracted For

A special problem of interpretation arises where the gold unit incorporated in the gold clause is devalued, but abrogation of gold clauses has not been decreed or for some reason is not applicable. This problem is sharply focussed by the numerous post-war German contracts between Germans or other non-Americans calling for payment of so-called "dollar-gold-marks", generally defined by contract and by statutes⁴⁰ as a fraction (10/42nds) of the American dollar, but payable in marks. Many life insurance policies, and bond loans,⁴¹ as well as other contracts, were so expressed. When the dollar was devalued the question arose whether the dollar-gold-mark was to be calculated on the basis of the "old" or the "new" dollar. American law was not material here,⁴² and the clause was simply to be construed according to German law. The *Reichsgericht* held that the phrase "gold-mark" was a real gold value clause, requiring the use of the old standard of the dollar.⁴³ It is necessary to note, however, that the conversion into marks was made under German exchange-control, i.e., without taking into account the actual depreciation of the mark. This fact made the holding financially tolerable to German debtors.

The Austrian Supreme Court decided in the same way in the case of a "dollar-gold-mark" contract made by a German with an Austrian corporation.⁴⁴ A similar judgment was

⁴⁰ Thus by the decrees having the force of law, of Feb. 6, 1924, sec. 1, *R.G.Bl.* 1924 I 50; of Feb. 24, 1924, sec. 3(II), *ibid.*, 1924 I 74; of June 27, 1924, Art. I(1b), *ibid.* 1924 I 660. See *infra*, p. 331, n. 21.

⁴¹ See Ernst Wolff, *Schuldverschreibungen auf Reichs-oder Gold-mark mit unechter Valutaklausel* (1935).

⁴² *Infra*, sec. 30, n. 24.

⁴³ Judgments of July 5, 1935, *R.G.Z.* 148, 42; Jan. 31, 1936, *R.G.Z.* 150, 153 (both involving "dollar-gold-mark" life insurance); Nov. 12, 1934, *J.W.* 1935, 189 (bonds of the *Hannoverscher Provinzialverband*); May 28, 1936, *J.W.* 1936, 2058 (bonds of the *Deutscher Sparkassen-und Giroverband*); April 27, 1936, 35 *Bankarchiv* 442 (unbonded loan, by the *Siemens-und Halske Aktiengesellschaft* to the *Energieversorgung Gross-Dresden Aktiengesellschaft*); Oct. 22, 1936, *R.G.Z.* 152, 166 (Treasury gold bonds of 1923).

⁴⁴ Judgment of May 20, 1936, 3 *Ob.* 178/36 cited by 2 Plesch, *Die Goldklausel* (1937) 114. The case of the judgment of Dec. 5, 1935, *Die Rechtsprechung*, 1936, 22 is different, the "intrinsic gold value" of the

handed down by the Supreme Court of Sweden in a case involving "dollar-gold-mark" bills of exchange drawn by a German upon a Swedish firm.⁴⁵ Italian⁴⁶ and Polish⁴⁷ courts have also upheld contracts between non-American parties entered into on a "gold-dollar" basis before the devaluation of the dollar, when payment was to be made in the national currency. The courts of the various countries are thus in accord on this question.

The holdings have been the same where the monetary unit devalued was the national money of the parties and the gold clause had not been abrogated by law. When the Italian lira was devalued in 1927 from 322 milligrammes of fine gold to 79 milligrammes, lower courts attempted to interpret "gold-lira" contracts in terms of the devalued "gold" lira,⁴⁸ but were reversed by the Court of Cassation.⁴⁹ "Gold-Lira" clauses were thus safeguarded, but after official quotations of the gold price were discontinued by a decree of September 17, 1932,⁵⁰ the Court of Cassation concluded that the last official quotation of September 30, 1932, should be binding upon the parties and upon the courts, despite later depreciation of the lira. This meant, of course, an indirect partial invalidation of the gold-lira clauses.⁵¹ The devaluation of the lira in

loan as of the day of lending having been guaranteed by the debtor. That this amounted to a real gold clause is almost without question. When, however, an Austrian borrower of \$1000 in 1931 promised to pay back the loan in *Goldwährung der Vereinigten Staaten* (perhaps: in gold-standard currency of the United States) this obscure phrase was not considered a sufficiently distinct gold clause. Judgment of Feb. 23, 1937, *Die Rechtsprechung*, 1937, 62. On the ambiguity of the term *Währung*, see *supra*, p. 136, n. 9.

⁴⁵ Judgment of April 27, 1935, *Bull. I.I.I.* 33, 278. The bills referred simply to "goldmarks" but this was to be understood as "dollar-gold-mark" under the German decree of Feb. 6, 1924, *supra*, n. 40.

⁴⁶ Appellate Court of Milan, July 19, 1934, *R.D. Comm.* 1935 II 531 at 540.

⁴⁷ Supreme Court of Poland, March 21, 1935, 2 Plesch, *The Gold Clause* (1936) 41 [regarding bills of exchange calling for gold dollars].

⁴⁸ *Cf.* Court of Cassation, June 12, 1931, *Foro Italiano*, 1931 I 1415 reversing Appellate Court of Naples, May 21, 1930. Recently the erroneous theory was again advanced by the Appellate Court of Venice, July 15, 1937, *Foro delle Venezie*, 1937, 763. The question would not have arisen under the customary American gold clause indicating weight and fineness.

⁴⁹ See case cited *supra*, n. 48. Other cases are listed by Ascarelli *R.D. Comm.* 1933 II 190, commenting on the 1932 judgment. See also Ascarelli, "Clausole oro e stabilizzazione della moneta", *Rivista di Diritto Internazionale*, 1929, 576.

⁵⁰ Decree of Sept. 17, 1932, n. 1234, *Raccolta Ufficiale* 1932 III 2371.

⁵¹ Italian Court of Cassation, Feb. 5, 1936, *R.D. Comm.* 1936 II 386, 399. Although the decree of Jan. 10, 1918, no. 26, *Raccolta Uffi-*

1936, on a lower level resulted in a corresponding increase from about 3.66 to 6.20 of the number of lire equivalent to a gold lira; again, a depreciation of the lira subsequent to the devaluation decree must be disregarded.⁵²

SECTION 27

OPERATION OF GOLD CLAUSES

I. Significance of the Subject Matter

While much thought and labor, legislative, judicial, and theoretical, have been expended upon the problems connected with the existence and the validity of gold clauses, there has been little discussion of the *operation* of such clauses. This deficiency is easily explained. In the great majority of cases gold clauses were destroyed by legislative or judicial action as soon as creditors actually sought to enforce them against the debtors. Where there was no direct nullification of the clauses, their enforcement was frequently checked or made impossible by moratoria and by exchange-control regulations. Again, in the infrequent cases where the clause was actually given effect, what probably happened was payment in currency of the value contracted for; and this was also true for gold coin clauses. Hence, there was no occasion for considering the problems connected with the use of gold coin itself. Still legislators and draftsmen of contracts have endeavored to render gold clauses workable in any contingency by the employment of appropriate instrumentalities. Their efforts have had little or no success, but at least they have revealed diffi-

ciali 1918 I 65 (German translation in Nussbaum, *Vertraglicher Schutz* [1928] 83) prescribed conversion of gold debts into currency on the basis of the official gold quotations, it does not follow that after such quotations were discontinued, the last quotation ought to be permanent. The natural conclusion would be that the power of the Court to ascertain the value of gold according to the rules of evidence was reestablished. To be sure the Court referred to an official explanation of the decree warranting the opinion of the Court. The doctrine criticized was, however, not employed in the case of the *Lloyd Triestino* loan where not the "gold lira" but an international "gold franc" was contracted for. Court of Cassation, two judgments of Aug. 4, 1936, *Foro Italiano*, 1936 I 1397 and *La Settimana della Cassazione*, 1937, 7.

⁵² Royal decree of Oct. 5, 1936, no. 1745 (tr. 1936 *Fed. Reserve Bull.* 881) as interpreted by the Appellate Court of Milan Nov. 5, 1937, *Foro Italiano*, 1938 I 648 and Tribunal of Padova, Feb. 1, 1938, *Foro delle Venezie*, 1938, 304 at 309.

culties, inherent in the employment of gold clauses and not apparent on first inspection. Judgments illustrating the operation of the clause are for the most part American of the post-Civil War period.

II. Application to "Gold" Obligations, of the Rules of Ordinary Debts

The gold coin clause, the normal type of gold clauses, presents a theoretical difficulty. Is the obligation to supply the obligee with a definite amount of gold coin "monetary" in nature and hence a debt; or is it an obligation to deliver commodities? In a strict legal sense, there is no debt since the obligor has not the liberty, characteristic of debts, to choose which of the available kinds of media of payment he will employ.¹ The commodity feature of the clause is emphasized by the common American formula indirectly fixing the quantity of coins owed, in terms of weight. Nevertheless, after some hesitation,² the American courts, during and after the Civil War, did treat these coin obligations as debts.³ The easy availability of gold coin, and its persistent use in the discharge of debts,⁴ was behind the "dual currency" theory of the courts. For that reason judgments on gold coin

¹ In Y.B. 9 Edw. IV 49 (Hil. T. Pl. 6, 1470), *supra*, p. 302, n. 3, the plaintiff brought an action of debt in the *debet et detinet* for the nominal amount in Pound sterling of the nobles and groates as of the time of contracting. The defendant set forth that the action did not lie in the *debet* because of the commodity character of the claim. In addition he alleged a variance between declaration and evidence because the nobles had been raised meanwhile, enhancing the debt beyond the amount claimed. The determination of this defense, illustrating common law procedure, is not reported.

As late as 1695-96 a dictum of Lord Holt, C.J., stated that the gold premium of the guinea was not recoverable in an action of debt (*Pope v. St. Leiger*, 5 Mod. 1, 87 English Rep. 481 (1695)). It could, however, be recovered as damages in an action on the case. *Fencot and Burroughs Case* (1694), referred to in 1 Lutwyche 434 at 488, 125 Eng. Rep., at p. 257. The statute of 1552 prohibiting dealings in gold coins above their legal value was not mentioned in these cases. Cf. *supra*, p. 33, n. 42.

² *Bronson v. Rodes*, 7 Wall. (74 U.S.) 229 (1868).

³ *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 at 694 (1871); *Thompson v. Butler*, 85 U.S. 694, 697 (1877); *Norman v. Baltimore and Ohio R. R. Co.*, 294 U.S. 240, 302 (1935); *Howe v. Nickerson*, 14 Allen (96 Mass.) 400 at 401 (1867) (excellent opinion delivered by Mr. Justice Gray). The same theory is to be found in *Jolley v. Mainka*, 49 C.L.R. 242 at 248 and 265 (High Court of Australia, 1933). The power to borrow money includes the power to promise payment in gold coin, *supra*, p. 322, n. 35.

⁴ *Supra*, p. 181.

claims were given in terms of gold coin,⁵ an adjudication on which debtors also insisted occasionally if judgment should go against them.⁶ On the public sale of the debtor's belongings payment had to be made in gold coin;⁷ and in assessing damages for breach of contract the monetary rule was used under which damages for the delay of payment were restricted to legal interest.⁸ Despite the general rule that negotiable instruments must call for the payment of a sum certain they were allowed to be expressed in terms of dollars in gold coin.⁹

In continental countries the paramount question, apparently not a subject of dispute in the United States,¹⁰ was whether or not mortgages couched in terms of gold could

⁵ *Bronson v. Rodas*, 7 Wall. (74 U.S.) 229 (1868) [somewhat contradicting the commodity (bullion) theory adopted]; *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871); *Thompson v. Butler*, 95 U.S. 694 (1877); and cases in next footnote. In *Gregory v. Morris*, 96 U.S. 619 (1877), a judgment for the tortious detention of personal property was rendered in terms of ordinary dollars but for a sum equal in value to the specified amount of coin as bullion.

⁶ As happened in *Butler v. Horwitz*, 7 Wall. (74 U.S.) 258 (1868), and *Dewing v. Sears*, 11 Wall. (78 U.S.) 379 (1871). The defendants perhaps expected a decrease in the premium on gold.

⁷ Act of March 3, 1865, sec. 12, 13 Stat. 491 at 494, 28 U.S.C. 786; see also 19 U.S.C. 199.

⁸ *Wilson v. Morgan*, 27 N.Y. Super. Ct. (4 Rbt.) 58 at 72 (1866); *American Chiclé Co. v. Somerville Paper Box Co.*, 50 Ont. L.R. 517 at 525 (Sup. Ct. of Ontario, 1921).

⁹ *Chrysler v. Renois*, 43 N.Y. 209 (1870); *Eastman v. Sunset Park Land Co.*, 35 Cal. App. 628, 170 P. 642 (1917). The *Uniform Negotiable Instruments Law*, sec. 6, provides that "the validity or negotiable character of an instrument is not affected by the fact . . . (5) that it designates a particular kind of current money in which payment is to be made." In *Wright v. Morgan*, 37 S.W. 627 (Texas Civil Appeals, 1896), a note calling for payment "of \$900 in gold coin or its equivalent in currency of the U.S. in the option of the holder of the note" was held negotiable. This holding would be dubious under the *Negotiable Instruments Law*, sec. 5(4) which permits giving the holder an election for "something to be done" "in lieu of payment of money." See also *Belcher v. MacDonald*, 9 Brit. Col. Rep. 377 (Sup. Ct. of British Columbia, 1902) [a Klondyke case involving a note for \$100,000 payable on demand in gold dust at \$16 an ounce. The note was held non-negotiable.] An amendment of sec. 6(5) of the *Negotiable Instruments Law* has been suggested by the 43rd National Conference of Commissioners on Uniform State Law (1933) (*Handbook*, 160) to the effect that it is to read "particular medium" in which payment is to be made in lieu of "particular kind of current money". See *infra*, sec. 33, following n. 19.

¹⁰ As to other common law countries, it may be mentioned that in *Jolley v. Mainka*, *supra*, p. 306, n. 23, a gold mortgage was involved. The property, however, was situated in the formerly German New Guinea. The present writer knows also an instance of an English gold mortgage, with a foreign creditor.

be recorded in the land registers. On principle, the German¹¹ and other civil law systems require mortgage-obligations to be expressed in sums certain of money in order to keep the existing charges on real estate determinate and easily calculable. An obligation to pay in gold is an obligation for a sum certain only so long as the currency is on gold. The *Reichsgericht*, in 1902, permitted recording of a mortgage containing the clause "all payments have to be made in gold."¹² At that time only ten and twenty mark gold coins were in circulation in Germany. The court seems to have been unable to conceive that the German monetary situation could ever deteriorate. This appears to be the explanation for the rather meaningless hypothesis in support of its decision advanced by the court, which was that, if 15, 30, 50 or 100 mark gold coins should be issued in the future, the amount of the debt would not be affected thereby. The latter assertion was, of course, true or rather trivial, but it missed the point of the gold clause which was that the parties were looking to a situation in which gold coin should be at a premium. What the creditor, alarmed by the bimetallistic agitation, wanted was protection from a deterioration of the currency. The Court's puzzling lack of understanding of the intention of the parties is only explainable on the ground that in 1902 German monetary circulation was really saturated with gold. Checks were little used, and contrary to conditions in the United States, gold coins were commonly employed in ordinary payments. Nor was there any reminiscence of inflation. By 1902 the inflationary paper money issued by Prussia during the Napoleonic wars¹³ and redeemed at par after Napoleon's defeat was long forgotten. The idea that

¹¹ German Civil Code, sec. 1115 requires that the monetary amount of the debt, secured by the mortgage, be recorded.

¹² Decree (*Beschluss*) of Jan. 22, 1902, R.G.Z. 50, 145. A thorough and valuable legal discussion of the problem involved, which had already appeared before 1900, under Prussian law, had preceded this final adjudication by the Supreme German Court. See Bulling, *Die Wirksamkeit der Goldklausel* (1894) and Merfeld, "Die Goldklausel bei Hypotheken", (1895) 39 *Gruchots Beiträge zur Erläuterung des Deutschen Recht* 574, an excellent study of more than local interest. Schlegelberger, "Aufräumungsarbeiten auf dem Gebiete des Hypothekenrechts", (1931) 71 *Gruchots Beiträge* 449, is concerned with the legislative after-effects of inflation.

¹³ The so-called *Tresorscheine* (Treasury bills). For their history, see Sobernheim, "Die Geldentwertung als Gesetzgebungsproblem des Privatrechts" in (1923) 66 *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* 255 at 308.

"twenty marks" could possibly be different in value from a "twenty mark coin" never occurred to the judges. The result of the decision was that gold clauses were probably incorporated in the majority of German mortgage deeds, and in all in which banks, insurance companies and similar institutions were the mortgagees. When inflation developed during and after the World War, legislative infringement of creditors' rights was inevitable and consequently disillusion and complaint, private litigation and unpleasant public controversy with foreign powers were bound to follow.¹⁴ These were aggravated by the doctrinal impasse in which the courts had placed themselves, driving them to still further failures. The situation strikingly reveals the extraordinary responsibility thrust upon the courts in monetary matters.

Austrian courts have permitted the recording of "gold" mortgages in the land books¹⁵ without resort, however, to the erroneous proposition of the *Reichsgericht*. Gold mortgages do not seem to be recordable in France¹⁶ and Italy.¹⁷ The same rule is believed by noted writers to be the Dutch law.¹⁸

The giving of judgments in terms of gold units is no problem in civil law due to the absence of the rule *omnis condemnatio pecuniaria*.¹⁹ The only question is whether the special rules regulating debts of sums certain are applicable to gold coin clauses. In general the answer should be in the negative, particularly if the theory is approved that in a gold coin clause, a gold value clause necessarily "uncertain" in amount, is implied.²⁰ But where gold clauses are customary, the law may extend "sum-certain" rules to them, and this

¹⁴ *Infra*, sec. 30 at n. 95.

¹⁵ Appellate Court of Vienna, 1923, 5 *Die Rechtsprechung* 273; March 10, 1925, *Juristische Blätter*, 1925, 91. The same rule prevails in Czechoslovakia, Supreme Court of Czechoslovakia, Nov. 12, 1937, (1938) 4 *Zeitschrift für Osteuropäisches Recht (New Series)* 469.

¹⁶ See Appellate Court of Paris, Feb. 21, 1925, *J.D.Int.* 1925, 745 [requiring in the case of a Swiss-franc debt, the recording of a definite equivalent in terms of French francs]. Grave consequences were drawn by French courts from this rule, *infra*, sec. 35 at n. 51.

¹⁷ Italian *Codice Civile* 1965 and 1987 (n. 4), 1992; see Scaduto, *I Debiti Pecuniari e Il Deprezzamento Monetario* (1924) 83.

¹⁸ See Engelberts-Vissering-Libourel, *Inflatie en Goud-Clausule in Nederland* (1922) 55 and Meyers, *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 1924, 185 at 187. *Cf.*, however, law of May 24, 1937, *Staatsblad*, 1937, no. 204 (*infra*, p. 358, n. 5) annulling gold clauses in mortgages made before September 27, 1936.

¹⁹ *Supra*, p. 230.

²⁰ *Infra*, sec. 28 IV.

has been done, on a large scale, in German law²¹ and to a lesser extent, in American law.²²

III. *Ascertainment of the Gold Value*

The ascertainment of the true value of gold presupposes a free and well-charged gold market such as still exists in England.²³ Before the World War there were other gold markets of some size in the United States, France, Germany, and other countries, which, however, were dependent on the English market and not comparable with it. But these minor markets tended to vanish in the post-war period. As mentioned before, German post-war legislative regulation of gold clauses—the only elaborate non-restrictive gold clause regulation—attached the “gold-mark” partly to the dollar, thus creating the problematical device of the “dollar-gold-mark”, and partly to the London gold prices (“fine-gold mark”).²⁴ The latter scheme was also used in other European countries,²⁵ and is especially prominent in the field of mortgages.²⁶

The London market, of course, trades in terms of ounces and pounds (shillings, pence). Therefore, for German transactions, the London quotations must be converted into terms of grams and marks. Since the parties cannot be expected to carry out this complicated calculation at each payment,

²¹ Particularly by the mortgage legislation, discussed in the following pages, and by the decree of Feb. 6, 1924, *R.G.Bl.* 1924 I 50, allowing bills of exchange and checks to be couched in terms of gold mark. The decree was abrogated by laws of June 21, 1933, and August 14, 1933, *R.G.Bl.* 1933 I 409 and 605 and decrees of Nov. 28, 1933, *ibid.* 1933 I 1019. A decree of June 27, 1924, *R.G.Bl.* 1924 I 660, art. I(1) (b), provides specific rules for the mode of reference in judgments and confessions of judgment (*vollstreckbare Urkunde*) to the various types of “goldmark”.

²² See *supra*, p. 328.

²³ As to the London Bullion market, see S. E. Thomas, *The Principles and Arithmetic of Foreign Exchange* (1934) 355.

²⁴ *Supra*, p. 312.

²⁵ For instance, in Austria for the regulation of the gold *schilling*, Austrian Supreme Court, Feb. 1, 1933, *Die Rechtsprechung* 1933, 45 (Ann. by Wahle). Under the Italian decree of Jan. 10, 1918, no. 26 *Raccolta Ufficiale*, 1918 I 65, gold was to be officially fixed on the basis of the London rates; by a decree of July 17, 1921, n. 1063 *Raccolta Ufficiale*, 1921 III 2785, however, the dollar rate on New York was made the standard.

²⁶ Basic is the decree of June 29, 1923, *R.G.Bl.* 1923 I 482, discussed in Nussbaum, *Vertraglicher Schutz gegen Schwankungen des Geldwertes* (1928) 40; it was replaced by the decree of Oct. 10, 1931, *R.G.Bl.* 1931 I 569, analyzed by 3 Planck's *Kommentar zum Bürgerlichen Gesetzbuch* (5th ed., 1935) 991.

a weekly publication of London prices in terms of grams was provided by the German government and made binding upon the parties and the courts.²⁷ The price of the gram was expressed in pence and since the breakdown of the pound in 1931, in reichsmarks for the sake of convenience.²⁸ These were indispensable simplifications. But slight as their effects were, they introduced foreign and possibly distorting elements into the reckoning process; *viz.*, the Berlin rate of exchange of the pound; the fixation for a week's term, of a gold price which in fact varied during the week; and the postponement of the quotations, since the German official publications could at best only give London quotations of the preceding or even an earlier day. Moreover, the calculation to be done by the parties was also considerable. With the kilogram of fine gold equivalent to 2790 gold marks, we obtain the following equation, in which the price of the grams of gold expressed in German currency is called *g*, the gold mark *GM*, and the sum due *x*:

$$\begin{aligned} 2790 \text{ GM} &= 1000g \\ 1 \text{ GM} &= \frac{1000g}{2790} \\ x \text{ GM} &= \frac{1000gx}{2790} \end{aligned}$$

That calculation presumably would strain the ability or willingness of ordinary creditors and debtors to reckon. Still another trial awaits them. Which day shall be the law day? In order that the reckoning may be done in time, and the necessary payments prepared, the law day must be antedated by agreement. Such antedating has indeed become customary in German gold-mortgage deeds, particularly where the mortgagee is a bank or a similar institution. For practical reasons the legal date is fixed half a month or more earlier than the day of payment.²⁹ The interim risk of inflation is thereby

²⁷ Decree of 1923 in preceding note, sec. 2; release of the Minister of National Economy [*Reichswirtschaftsminister*] of July 20, 1923, *Deutscher Reichsanzeiger* of July 23, 1923.

²⁸ Decree of Oct. 10, 1931, *R.G.Bl.* 1931 I 569.

²⁹ The question whether the day of payment or the day of maturity should be used in the computation of the amount owed, is far more important in the conversion of foreign currencies and will be treated in that connection, *infra*, sec. 33 I. There is little authority and discussion of the gold-clause aspect of the problem. In regard to gold clauses

shifted to the creditor and may be very great in times of rapid inflation.³⁰

In order to minimize these perils,³¹ a number of refinements have been introduced into the gold clause. Of primary importance is a provision according to which deviations of the gold price from parity are to be taken into account only when the difference exceeds a definite percentage either way. This clause, which may be called a "clause of tolerance",³² is found in all kinds of protective monetary clauses and is in almost universal use.³³ In German mortgage practice the

Italian courts seem to adhere to a day-of-maturity theory, in accordance with legislative prescriptions of 1916, see Ascarelli in *Z.A.I.P.* 1928, 793 at 811, n. 4.

³⁰ See *Reichsgericht*, Nov. 13, 1924, *R.G.Z.* 109, 174 (concerning a "rye" mortgage). For a discussion, see *infra*, sec. 31 at n. 10.

³¹ Another difficult problem is the determination of the law day in case the debtor does not pay in time. This day does not necessarily coincide with the day considered in n. 29. It would be justifiable in such a case to give the creditor the option of having the amount due calculated either at the rate prevailing at maturity or at the rate prevailing at the time of payment. There are elaborate provisions on this point in German mortgage deeds. Nussbaum, *Vertraglicher Schutz gegen Schwankungen des Geldwertes* (1928) 49 and 45. Extremely obscure were some pertinent provisions of the 1923 decree, see Nussbaum, *op. cit.*, 44. The objections raised there have been taken into account in the drafting of the 1931 decree, but they may still be important with regard to mortgages registered before the 1931 decree came into operation.

³² *Supra*, p. 66. "Tolerance" with regard to coins refers only to a deficiency in value; applied to the creditor-debtor relationship, however, the term allows the inclusion of an increment in the intrinsic value which the debtor has to "tolerate". The *Reichsgericht*, Feb. 10, 1932, *R.G.Z.* 135, 142 employs the term "Schwankungsklausel" (fluctuation clause) but this hardly conveys the idea of the clause.

³³ Including foreign-currency and "index" clauses. The tolerance clause has been passed upon in the following cases: Appellate Court of Paris, July 1, 1931, *Gazette du Palais*, 1931 II 886 [index clause, 10%]; Appellate Court of Douai, May 23, 1933, *Revue du Droit Bancaire*, 1934, 276 [exchange guarantee clause, almost 50%]; Italian Court of Cassation, Jan. 10, 1936, *R.D. Comm.* 1936 II 386 [gold clause, about 10%]; Appellate Court of Milan, July 19, 1934, *ibid.*, 1935 II 531 at 540 [gold dollar clause, 2%]; same court, Nov. 5, 1937, *Foro Italiano*, 1938 I 648 [gold value clause, 10% in either direction]; Court of Torino, May 22, 1934, *R.D. Comm.* 1935 II 531 at 569 [combined sterling and index clauses, 10% in either direction]; Court of Padova, Feb. 1, 1938, *Foro delle Venezie*, 1938, 304 [gold lire clause, 10%]; Appellate Court of Brussels, March 9, 1935, *Belgique Judiciaire*, 1935, 339 [exchange guarantee clause, approx. 12%]. Other examples of tolerance clauses are the bonds of the former Rand Cardex Corporation [index clause, 10% in either direction] *infra*, sec. 31 II, or the form of an Australian lease deed, *infra*, sec. 31 n. 19, and of Australian and French collective bargaining agreements, *infra*, sec. 31, n. 20, 21. The Prussian legislature resorted to a tolerance clause as early as 1808, *supra*, p. 299.

In the Torino case it was correctly held that in case the increase or decrease exceeds 10%, the whole spread—tolerance plus excess—must be considered in the computation of the payment. In the Douai case a

clause ordinarily reads: "The debtor has to pay one reichs-mark for each gold mark, unless the price of a kilo of fine gold either exceeds 2820 or declines below 2760 reichsmarks." This clause, allowing a "tolerance" of little more than two per cent, was favored by the courts³⁴ and was prescribed by law for certain types of mortgage bonds.³⁵ A twenty per cent "tolerance" (ten above and ten below) seems to be more usual.

Another and not infrequent provision requires the debtor to pay no less than the nominal amount contracted for; for instance "1000 gold mark, but not less than 1000 reichsmarks". An appreciation of the agreed currency over parity would, under this clause, give the debtor no right to reduce his payment. This "minimum clause" has much to recommend it, but it is unnecessary when combined with a tolerance clause. On the other hand, while appreciation of the monetary unit beyond the limit of tolerance is hardly to be expected, it would be unfair, if that should happen, to deny the debtor relief, since the supposed considerable lowering of the gold price would probably augment the purchasing power of the monetary unit.³⁶

"temporary" excess over the tolerance was disregarded, a highly debatable holding which should expressly be prevented by the terms of the clause. It may furthermore be desirable to allow only for major deflections. Under the terms of the Rand Cardex loan, deflections of less than 10% were disregarded. Deflections of more than 10% but less than 20% were therefore treated as equivalent to a deflection of 10% and so on.

³⁴ It has been held that after registration of a mortgage has become effective, a tolerance clause may subsequently be inserted without the assent of the junior mortgagees. The tolerance clause may affect their interest because a shrinking of the first mortgage, due to a decline of the gold price will be prevented by the clause within the limits of the tolerance. *Reichsgericht*, Feb. 10, 1932, *R.G.Z.* 135, 142.

³⁵ Decree of July 28, 1926, *R.G.Bl.* 1926 I 423.

³⁶ Under the Central-European land-book system, registration of minimum clauses encounters various technical difficulties. See 3 *Planck Kommentar zum Bürgerlichen Gesetzbuch* (5th ed., 1935) 992. Austrian courts found the minimum clause unrecordable. Appellate Court of Vienna, June 27, 1935, *J.D.Int.* 1936, 444 [calling it "paper clause" because the sum due—in the above instance—would be at least 1000 "paper" marks.]

SECTION 28

JUDICIAL RESTRICTION OF GOLD CLAUSES

I. Gold Clauses Under "Cours Forcé".

*The French Rule*¹

The process of gradual deterioration of the monetary unit, by means of debasement, "raising the coin",² inflation, and other devices has nowhere been more consistent and striking than in France where from the time of Charlemagne until the Great Revolution the *livre* gradually shrank more than 98 per cent.³ Only by force were the French kings able to impress the burden of this policy upon the people. Among the means employed by the monarchs was the prohibition of clauses used by creditors to safeguard themselves against the effects of the royal policy. As early as the 16th century⁴ disapproval of such clauses had been embodied in legal doctrine. At the time of John Law this doctrine was used by the *Conseil*

¹ The following list may serve as a survey of the French pertinent literature. Capitant, "*Les succédanés de la clause-or*", *D.H. Chronique* 1926, 33; same, "*Du sort du contrat contenant une clause annulée comme contraire aux lois sur le cours légal*", *D.H. Chronique* 1927, 1; Champcommunal, "*La stabilisation des prix dans les contrats à terme*", *Annales de Droit Commercial*, 1926, 93; Demogue, "*De quelques clauses tendant à se prémunir contre les variations de valeur du franc*", *Journal des Notaires et des Avocats*, Feb. 20th, 1923; Gény, "*La validité juridique de la clause—payable en or*", *Revue Trimestrielle de Droit Civil*, 1926, 557; same, "*Cours légal et cours forcé en matière de monnaie et de papier-monnaie*", *Revue Trimestrielle de Droit Civil*, 1928, 5; Hubrecht, "*Stabilisation du Franc et Valorisation des Créances*" (1928); Lefon, "*Des Contrats d'Assurances sur la Vie Souscrits en Monnaie Etrangère ou en Francs-Or*" (1929); Mestre et James, "*La Clause-Or en Droit Français*" (1926); Niboyet, "*Des conflits de lois relatifs aux paiements, etc.*", *Revue de Droit International Privé*, 1925, 161; Nogaro, "*La clause payable en or*", *Revue Trimestrielle de Droit Civil*, 1925, 5; Penciulesco, "*La Monnaie de Paiement dans les Contrats Internationaux*" (thesis Paris, 1937); Perroud, "*La détermination de la monnaie de paiement, la clause paiement or et le problème du change*", *J.D.Int.* 1924, 628; Picard, "*La Clause 'paiement or' et les règlements extérieurs*", *J.D. Int.* 1927, 34; Piret, "*Les Variations Monétaires*" (Brussels, 1935) 226; Pirotte, "*La Clause-Or devant la Loi et les Tribunaux*" (Brussels, 1933); Rivière, "*Problème du franc-or*", *Revue de Droit International Privé*, 1932, 1; Schkaff, "*La Dépréciation Monétaire, ses Effets en Droit Privé*" (1926); Seignol, "*Clauses Destinées à Parer l'Instabilité Monétaire, l'Option de Change et l'Option de Place*" (1935). On the comparative law aspect, see *supra*, p. 301, n. 1; on the conflicts of laws aspect, see *infra*, sec. 30, n. 1.

² *Supra*, p. 10.

³ *Supra*, p. 11, n. 38.

⁴ *Infra*, p. 340.

d'Etat du Roi to declare void promises to pay in specie.⁵ In the period of the assignats the legislature expressly proclaimed that "all sums stipulated as being payable in specie may be paid in assignats . . . notwithstanding any clause or disposition to the contrary".⁶ A similar law was later enacted in order to enforce the circulation of the *mandats territoriaux*.⁷

These provisions were constantly applied by the courts,⁸ thus creating a tradition which was revived during and after the Franco-Prussian war of 1870-1. By Act of August 12, 1870,⁹ the notes of the *Banque de France* were declared legal tender, and redemption was suspended. The effect of this Act upon pre-existent gold clauses was considered by the *Cour de Cassation* in the famous case of *Do-Delattre v. Scouteten*.¹⁰ The spouses Do-Delattre had promised before the war to pay their debts to Scouteten in "gold or silver coin and not in any value or paper money made legal tender in France through laws or decrees which hereby are waived by the debtors in good faith and upon honor . . ." Although the law of 1870 did not contain the "notwithstanding-any-clause-to-the-contrary" provision, the challenging stipulation of the contrary was met by the court, which held it ineffective during the existence of the *cours forcé*, that is, as long as the irredeemable bank notes should be legal tender. Consequently the debtors were allowed to discharge their debt in depreciated bank notes.

The problem arose anew in a case after the World War where a Frenchman brought suit against the New York Life Insurance Company for the payment in gold of a "gold-franc" life insurance policy.¹¹ The court held the company liable for

⁵ A number of these ordinances are reproduced in [1922-23] 1 *Revue du Droit Bancaire* 261. The use of gold and silver clauses was again permitted, after the breakdown of the Law experiment, by an ordinance of August 15, 1720, *loc. cit.*, 264. The resulting situation was described in *Arbuthnot v. Read*, 24 House of Lords' Journal 54 b. (H. of L., 1731-1732) [printed briefs, in Columbia Law Library under "Appeal Papers, House of Lords" vol. 1, p. 356].

⁶ Decree of Sept. 12/18, 1790, 1 Duvergier, *Collection des Lois* 416.

⁷ Law of 15 Germinal Year IV (April 4, 1796), art. 2, 9 Duvergier, *Collection des Lois* 83; Mestre and James, *op. cit.*, 67, n. 1.

⁸ See (1855) 35 Dalloz, *Jurisprudence Générale* (tit. "papier monnaie") 13.

⁹ D.P. 1870 IV 76.

¹⁰ Judgment of Feb. 11, 1873, D.P. 1873 I 177.

¹¹ Judgment of June 7, 1920, in *New York Life Ins. Co. v. Deschamps*, J.D.Int. 1920, 654.

gold francs on the ground that the *cours-forcé* laws, re-enacted during the World War,¹² rested exclusively on the national interest and were not intended to prevent gold from re-entering France. The *Do-Delattre v. Scouteten* rule thus received a nationalistic twist which made readjustment necessary. In a suit brought by a Swiss life insurance company for recovery of a gold mortgage on Alsatian real estate the court awarded the Swiss company the gold value of the mortgage, emphasizing the fact that Basle was the place of payment. The court in this case pointed out that the *cours forcé* rule was restricted to French territory.¹³ Yet the new doctrine of the court, making the place of payment decisive as to gold clause abrogation, would have led to an invalidation of gold clauses embodied in French loans to foreigners and providing for a French place of payment. In view of the tremendous national interest in this situation, Paris being the place of payment in nearly all French loans to foreign governments and enterprises, the French Minister of Justice, by circular letter, asked the *procureurs généraux* (Attorneys General at the Appellate Courts) to contest the conclusiveness of the "place of payment" in the determination of the territorial effects of the *cours forcé*.¹⁴ Instead, he urged them to stress, as determining, the question whether financial operations involved were strictly domestic or required payment from one country to another.¹⁵ In accord with this theory, *Procureur Général Matter* (later on President of the *Cour de Cassation*) in phrases often repeated since, declared that the criterion should be whether the payments contracted for would produce a movement of "flux and reflux" ("double transfer") across the frontiers.¹⁶ The courts responded to that suggestion, which in a few cases was expressly adopted,¹⁷

¹² In addition to the law of Aug. 5, 1914, rendering inconvertible bank notes legal tender, the Court referred to an Act of Feb. 12, 1916, prohibiting trading at a premium in national coins. *D.P.* 1914 IV 88; 1916 IV 323.

¹³ In *Scherrer-North v. Banque Hypothécaire de Bâle*, Jan. 23, 1924, *J.D.Int.* 1924, 685. The "mark" amount due was converted by the Court into French francs through a calculation which procured to the creditor a little less than the full gold value. On the "territoriality" doctrine, *supra*, p. 52.

¹⁴ Release of July 18, 1926, *J.D.Int.* 1927, 236.

¹⁵ See *D.P.* 1928 I 27; *J.D.Int.* 1931, 6.

¹⁶ *J.D.Int.* 1931, 6.

¹⁷ See, e.g., *Cour de Cassation*, July 31, 1923, and Nov. 2, 1932, *J.D.Int.* 1929, 113, *ibid.* 1933, 1197; Appellate Court of Bordeaux, Jan.

by substituting a broad rule for the place-of-payment theory, embodying, and even going beyond the "flux and reflux" idea. Said the *Cour de Cassation*: "The international character of a transaction does not necessarily depend on the domicile of the parties and on the place of payment but on its nature (*sic*) and on all the elements which may be taken into account in impressing upon the movements of the funds involved a character exceeding the scope of the national economy".¹⁸

Adopting the theory of the *Cour de Cassation*, the French Stabilization Act of June 25, 1928,¹⁹ devaluing the franc from 322 to 65.5 milligrams of fine gold, exempted from the effects of devaluation "international payments" validly stipulated in gold francs before the promulgation of the Act. The invalidity of earlier domestic gold clauses was of course not remedied by the restoration of the convertibility of bank notes on the lower level. The Monetary Law of October 1, 1936,²⁰ further devaluing the franc to 43.49 milligrams of fine gold extended exemption to all "international payments" previously stipulated in terms of francs—regardless of whether they were gold francs or plain "francs". Those payments were to be made on the parity existing at the time of contracting.²¹ This amounted to a radical "revaluation" of international franc debts, leaving the definition of the latter to the discretion of French courts. French creditors were expected to profit considerably from this measure,²² and there probably were not very many French private debtors affected by this

28, 1936, *Sirey* 1936 II 182. The "double transfer" doctrine was also adopted in the short-lived law of Oct. 1, 1936, *infra*, n. 20, but it soon revealed its inadequacy, see Court of Bethune, Dec. 23, 1936, *J.D.Int.* 1937, 761.

¹⁸ *Banque Hypothécaire Franco-Argentine*, Jan. 14, 1934, *D.P.* 1934 I 73 at 78 and 79. See also the judgments of June 3, 1930 (*Crédit Foncier Franco-Canadien*), *D.P.* 1931 I 9; July 9, 1930 (*Société du Port de Rosario*), *D.P.* 1931 I 14; Jan. 14, 1931 (*Ville de Tokyo*), *D.P.* 1931 I 18; July 7, 1931 (*Société d'Héraclée*), *J.D.Int.* 1932, 403.

¹⁹ *J.D.Int.* 1928, 1161; *D.P.* 1928 IV 313 at 317.

²⁰ *D.P.* 1936 IV 393. See Capitaint, *D.H. Chronique* 1936, 37; Mestre, *Gazette du Palais* of Oct. 15, 1936; *Z.A.I.P.* 1936, 668; Baron Nolde, "Les lois monétaires de 1937, et le droit international privé", *Revue Critique de Droit Int. Privé*, 1937, 443; Löbl, "Der Einfluss des französischen Währungsgesetzes", *Oesterreichische Zeitschrift für Bankwesen*, 1936, 185.

²¹ Act cited in preceding note, sec. 6.

²² This viewpoint, generally emphasized in the parliamentary debates, was particularly stressed by Senator Dumont, chairman of the Committee on Gold-Clauses, who estimated, probably too high, the amount of franc debts floated without gold clause in France since 1928, as three billion francs. *Journal Officiel* of Oct. 1, 1936, p. 1425.

extraordinary law. The legislature, in its enthusiasm for the international-payment theory, had, however, entirely overlooked the fact that the French Government had guaranteed a number of franc-loans of allied foreign governments, as for instance an 8 per cent five-year loan of Czechoslovakia of 600 million francs, issued in 1932 and due in 1937. The French Government was bound by the law of October 1, 1936, to pay the gold value, but the Czechoslovakian Government and other foreign franc debtors were not. Foreign courts would probably have disregarded a law so arbitrary and retroactive. This internationally embarrassing legal complication was revealed by the French Minister of Finance, M. Vincent Auriol, in a speech before the French Chamber of Deputies, on February 9, 1937.²³ The Minister pointed out that the 1936 law imposed upon the French Treasury a burden of at least 600 million francs. Thereupon the law was repealed with retroactive effect, by an act of February 18, 1937,²⁴ which restored the rule of 1928 in respect to gold clauses.²⁵

In addition to the doctrine of "international payments" which is frequently called the doctrine of "international contracts" the French law has another distinctive feature. Starting from the proposition that within French territory no private stipulation can prevail over the *cours forcé* of French bank notes, not only gold clauses, including gold value clauses,²⁶ but stipulations for payment in foreign money ("foreign-currency clauses")²⁷ or in francs measured by foreign currency ("foreign-currency-value clauses", "exchange guarantee clauses", *clauses de garantie de change*) were denied legal effect.²⁸ Nor were the parties allowed to stipulate in

²³ *Journal Officiel* of Feb. 10, 1937, p. 408.

²⁴ *D.P.* 1937 IV 65. See Niboyet in *Gazette du Palais* of March 1, 1937, and Baron Nolde, *loc cit.*, *supra*, n. 20, at 443. Under this law the curious question, not discussed by the writers, arises as to whether the retroactive feature will be recognized by non-French courts. French courts refuse to apply a retroactive foreign law. *Tribunal Civil de la Seine*, April 9, 1930, *J.D.Int.* 1930, 1012; May 26, 1936, *Gazette du Palais*, 1936 II 329. See also *supra*, p. 295, n. 56.

²⁵ *Supra*, n. 19.

²⁶ Appellate Court of Paris, Feb. 22, 1924, *J.D.Int.* 1924, 702.

²⁷ *Cour de Cassation*, May 17, 1927, *D.P.* 1928 I 25; March 27, 1929, *D.H.* 1929, 217; Nov. 2, 1932, *D.H.* 1932, 571; April 29, 1933, *D.H.* 1933, 333 (Moroccan case).

²⁸ *Cour de Cassation*, May 17, 1927, *D.P.* 1928 I 25; Dec. 31, 1928, *D.H.* 1929, 33 (gold-dollar-value clause); Dec. 22, 1930, *D.H.* 1931, 33;

terms of coupons of the French Government's loan of 1925 which was issued on a sterling basis.²⁹ Ordinarily, only references to commodity values and to indices were held valid.³⁰

II. Critique of the French Rule

The origin of the French doctrine has sometimes been sought in the subservience of French courts and legal writers to the desires and commands of the royal *fauxmonnayeurs*. This, however, is an oversimplification. It was the great Molinaeus (1500-1566) who, with perfect lucidity, first advanced the doctrine³¹ that the sovereign's determinations of weight, alloy and nominal value³² cannot be impaired by agreements of private individuals. Molinaeus qualified this statement by exempting periods of complete monetary confusion creating common disrespect for existing monetary laws.³³ He also starts from a "society theory" of money, presupposing a money accepted by the community. However, once money has become an accepted instrumentality of social intercourse, each member of the community, in Molinaeus' opinion, is bound to receive it and has to suffer the consequences of its breakdown. The present monetary *malaise* gives point to Molinaeus' pronouncements. "Just as when a public disaster occurs, it must be forborne by everybody and one citizen must not reproach nor cast the burden on another, so litigation (*débat*) on monetary mutations is not permissible among them." It is certainly remarkable that independ-

Appellate Court of Paris, March 23, 1927, *Gazette du Palais*, 1927 I 707; Appellate Court of Lyon, July 23, 1928, *Revue du Droit Bancaire*, 1929, 280.

Appellate Court of Douai, March 16, 1936, *Gazette du Palais*, 1936 II Index 118, n. 27 is different. A promise to sell, given on a sterling basis, was, through interpretation, held ineffective after England had abandoned the gold standard. This solution would seem acceptable regardless of any general doctrine.

²⁹ Court of Rouen, March 28, 1927, *Gazette du Palais*, 1927 II 90; *Tribunal civil de la Seine*, Jan. 21, 1928, *Revue du Droit Bancaire*, 1928, 463; Court of Belfort, March 10, 1926, *D.H.* 1926, 373. On the 1925 loan see Mestre and James, *op. cit. supra*, p. 335, n. 1, at 159.

³⁰ See *infra*, sec. 31.

³¹ Molinaeus, *Sommaire des Contrats* (1658 ed.), no. 293.

³² Molinaeus says *cours*; in Latin he ordinarily speaks of *valor impositus*. This refers to the tariffing, by the sovereign or other potentate of the various coins. *Supra*, p. 10.

³³ Molinaeus, *Tractatus Commercialium*, n. 818. In the "*Sommaire*" he refers to this qualification.

ently of French theory, American and English courts should occasionally have applied a similar doctrine.³⁴

And yet it cannot validly be contended that abrogation of gold clauses and of other protective clauses is a necessary corollary to the decreeing of *cours forcé*. The fact that during the greenback period *cours forcé* coexisted with gold clauses without serious disturbance, in itself furnishes convincing evidence of the contrary. Abrogation of gold clauses is an independent feature of an inflationary or, to put it otherwise, of an emergency monetary policy of resort to irredeemable paper money. Again it is for the legislature, and not for the courts, to decide whether or not this step should be taken because, as in the case of revaluation, it involves numerous considerations which a court is not competent to deal with. The legislature, though rendering irredeemable notes legal tender, may see fit not to abrogate protective clauses, perhaps confidently expecting recovery of the depreciated unit and being anxious to express this attitude by permitting the clauses. Or the government may desire to confine invalidation to existing gold clauses in order to keep the door open to new gold loans, or it may, as has actually been done by various legislatures, abrogate the clause in certain contracts and maintain it in others.³⁵ Judicial rule is not only too abrupt, but also too sweeping.

Still more objectionable is the French judicial rule as to "international payments" or "international contracts". A post-war invention,³⁶ it is derived from the allegedly "territorial" effects of the *cours forcé*. The 20-francs note of the Banque de France, so runs the argument, must be accepted *within* France, by each creditor as the equivalent of a 20-franc gold coin. Therefore, *within* France, gold clauses are made ineffective by the *cours forcé*. *Outside* France, it is alleged, the effectiveness of gold clauses remains untouched.

³⁴ *Infra*, pp. 347, 348.

³⁵ *Infra*, sec. 29 I.

³⁶ It was still unknown in the period following the Franco-Prussian war, Appellate Court Aix, Nov. 23, 1871, *D.P.* 1872 II 51 [gold clause undertaken by the French acceptor of a bill of exchange on behalf of a foreign maker; held invalid]. Contrary to the claim of *Procureur Général* Matter (*D.P.* 1931 I 12) the vague discussion of Valéry, *Manuel de Droit Int. Privé* (1914) 1000, 1001, cannot be said to be an authority for Mr. Matter's theory.

However, as was seen,³⁷ the *cours forcé* is not "territorial". In fact, after France had abandoned the gold standard the Banque de France never considered, nor did any French court or writer expect that foreign holders of French bank notes would be paid gold coin of the face amount, or their equivalent in currency. Nor is there any indication that French legal tender notes, or any other legal tender notes, were refused by foreign creditors of the respective currencies because of an alleged territoriality of legal tender rules. The foreign effect of irredeemability in itself is sufficient to explode the international contract theory as far as gold clauses are concerned. Were irredeemability destructive of gold clauses at all, it would then invalidate all gold clauses, domestic and international.

The fact that the *cours forcé*, as such, is by no means incompatible with the judicial protection of gold clauses, has been shown from the course of legal history. The compatibility of the two phenomena is particularly manifest in the case of gold *value* clauses. Admitting for the sake of argument that gold coin clauses run counter to the *cours forcé* this proposition would not hold good with respect to gold value clauses. The gold value creditor, by demanding, *in currency*, a sum in excess of the nominal amount of the debt, is willing to receive the irredeemable paper money at its full nominal value. The efficacy of gold value clauses, however, is the decisive question from a practical point of view.³⁸ From this angle, too, the territoriality doctrine breaks down.

Occasionally another explanation of the French theory has been advanced. It has been said that an "international contract" is not subjected to the power of a national legislature.³⁹ This again is a specious argument. The Appellate Court of Alexandria, formerly a faithful follower of French doctrine, rejected the international-contract theory very positively in 1936, pointing out that a genuine "international contract" is a contract between sovereign powers on matters of public law whereas the contracts under question are private

³⁷ *Supra*, p. 52.

³⁸ See *infra*, p. 352 and p. 354, at n. 108. Gold value clauses are ineffective under French law, *supra*, n. 26.

³⁹ This notion appears, *e.g.*, in the judgment of the Appellate Court of Alexandria, June 13 (18?), 1934, *Journal des Tribunaux Mixtes* of June 22/23, 1934, *J.D.Int.* 1934, 1008; it is stated also by Prof. Niboyet in *Gazette du Palais* of March 1, 1937, no. 59.

in nature and necessarily subject to national legislation.⁴⁰ The same view has been taken by the Supreme Court of Sweden.⁴¹ National courts may apply their national law to contracts involving foreign elements, and under the public policy (*ordre public*) doctrine frequently and strongly emphasized by these very French courts, may even apply national law to contracts which under the general conflict-of-laws rules would be governed by foreign law. This is particularly true in regard to domestic rules protecting the monetary order and vital institutions of national economy generally. To what extent *foreign* courts will recognize such use of the public-policy device is another question.⁴²

Besides suffering from lack of legal foundation, the "international-contract" doctrine is objectionable as being arbitrary. The transaction is often only partly "international". Bonds—"international" because issued by an Argentine corporation and floated through French banks—may have been subscribed to a considerable extent by Argentine or other non-French capitalists, whose payments never crossed the French frontier. Or the Argentine issuer may have used the proceeds of the French loan in France. These financial interests and movements are ordinarily not discernible without the closest knowledge of the internal affairs of the debtor. They are certainly entirely outside the field of legal analysis. The French courts, moreover, have enveloped their distinction in a haze. In the case of *Schwerdt v. Mumm*, the spouses Schwerdt had, in 1912 at Frankfurt-on-Main, made a loan of 2,500,000 francs "payable in Reims or Paris in current gold francs" to the famous champagne firm of Mumm & Cie of Reims, the partners of which were German nationals. After the war, the creditors brought suit for gold payment against the French receivers of the firm, the assets of which had been seized by the French government under the Treaty of Versailles. The *Cour de Cassation* held the clause void because a share in the partnership of Mumm & Cie had as early as 1912 been held by the creditors and then transformed into a loan. On this basis the court concluded that there had been no exchange of

⁴⁰ Judgments of Feb. 18, 1936, *D.P.* 1936 II 78. See also *infra*, n. 52.

⁴¹ Jan 30, 1937, in *Scandia Insurance Co. Ltd. v. The Swedish National Debt Office*, *Bull. I.I.I.* 36, 327; English translation in 3 *Guld-klausulmålet* (1937) 133 at 147. See also *Reichsgericht*, May 28, 1936, *J.W.* 1936, 2058.

⁴² *Infra*, sec. 30, n. 76.

funds between the two countries.⁴³ Similarly in the case of the *Société des Music Halls Parisiens v. Société Victoria Palace* where an English company had subscribed 250,000 francs of a bond loan of a French company, redemption to be made by a payment of £10,000, the clause was declared void because the English company at the time of the subscription, had been a creditor of the French company and had used its credit to discharge the subscription price.⁴⁴ The English creditor had, however, previously transferred its money to France, as had the spouses Schwerdt in the first case, and retransfer to their country was intended by the contract. The court interpolates a legalistic argument into a financial conception. The decisions in such cases obviously will vary as one turns to the economic or to the legalistic aspect of the situation.⁴⁵ The most recent formula of the *Cour de Cassation*⁴⁶ quoted earlier does away altogether with the last remnant of legal certainty.

The French themselves have occasionally felt the thorns of their own doctrine. In 1901 the Congo State raised a loan in Belgium and France. The individual bonds were made payable in gold francs in Brussels and in Paris. When a case involving these bonds arose, the Belgian Courts referred to the French doctrine. Asserting that there was *no* international contract (*sic*), they held the gold clause void. That the bonds were payable in Paris was held irrelevant. The judgments do not even mention the fact that the loan had been admitted to quotation on the Paris Bourse as well as the Brussels Bourse.⁴⁷ When the French creditors brought suit in the French courts against the Belgian State, successor to

⁴³ Judgment of July 31, 1928, *J.D.Int.* 1929, 113; same solution in like case, with another creditor, Appellate Court of Paris, April 18, 1928, *J.D.Int.* 1928, 972.

⁴⁴ Judgment of Nov. 2, 1932, *J.D.Int.* 1933, 1197, with judicious annotation by Professor Perroud.

⁴⁵ Likewise, when English investors in Algerian real estate made contracts with their tenants calling for payment of pounds in London or Algiers, this stipulation was held void by the *Cour de Cassation*, May 17, 1927, *Algiers Land & Warehouse Co. v. Pélissier du Besset*, *J.D.Int.* 1928, 419, and March 27, 1929, *D.H.* 1929, 217. *Contra*: Perroud, *J.D.Int.* 1928, 421; Esmein, *Sirey*, 1927 I 289; Court of Angers, Feb. 13, 1928, *J.D.Int.* 1929, 103. In this case there may be economic considerations in favor of the holding of the *Cour de Cassation*, yet it cannot validly be justified under the "flux-and-reflux" doctrine.

⁴⁶ *Supra*, p. 338.

⁴⁷ Belgian *Cour de Cassation*, April 27, 1933, *J.D.Int.* 1933, 739; Appellate Court of Brussels, Oct. 2, 1930, *ibid.*, 1931, 213.

the Congo State, they lost their case because the Belgian Government pleaded its immunity from jurisdiction.⁴⁸

On the whole, however, the French doctrine has decidedly served French national interests. During a period of thirty years before the World War, foreign loans amounting to forty billion francs were floated in France. A considerable part, if not the majority of these contained gold clauses.⁴⁹ Such clauses were probably used to a still greater extent in foreign post-war loans. True, there are a few cases of gold clauses undertaken by French debtors particularly in American post-war loans,⁵⁰ but weighed against French gold-clauses, the liabilities side is negligible. The fight for the maintenance of the contractual stipulations was conducted in France with remarkable frankness under the slogan of "protection of French savings" (*épargne*). This motive found its most striking expression in 1936 when the astounding legislative attempt was made to extend the maintenance of the original parity to "international" contracts with no gold clauses. It is worth noting that André Mater in his *Traité Juridique de la Monnaie et du Change* interprets the French cases to mean that abrogation of gold clauses through the institution of *cours forcé*, operates only in favor of French debtors, but does not give relief to foreign debtors of French creditors.⁵¹

By exempting "international" contracts from gold clause abrogation the French courts have accomplished legally what the French legislature would have found embarrassing to do politically. The result stands in contrast to the American legislation of 1933 which, at heavy sacrifice to American creditors, granted relief to American and foreign debtors alike.⁵²

⁴⁸ *Le Temps*, Oct. 16 and Nov. 22, 1933.

⁴⁹ *Rapport Annuel de la Commission des Emprunts-or (art. 18 de la loi du 23 décembre 1933)*, *Journal Officiel* of Jan. 17, 1936, p. 61. The Report contains a complete list of the foreign bond loans floated in France and makes graphic the tremendous amount of litigation regarding the gold clauses and other protective clauses attached to these loans. As to the losses sustained by French bondholders and by the French Treasury, see the speech of the deputy Boucher in the Chamber of Deputies, *Journal Officiel, Débats Parlementaires*, 1936, no. 82, p. 2806.

⁵⁰ They are listed by Scroggs, "Foreign Treatment of American Creditors", (1936) 14 *Foreign Affairs* 345, but not in the Report cited in the preceding note.

⁵¹ *Op. cit.* (1925) 192.

⁵² *Infra*, p. 397. The Mixed Appellate Court of Alexandria, March 31, 1938, *Bull. I.J.I.* 39, 352 at 359, rejecting the international contract doctrine, terms it a device adapted to the economic needs of creditor countries.

Still more regrettable is the course of French courts in the application of the rule once adopted. Not only were foreign creditors, by rather tenuous arguments, denied the benefit of the "international contract" theory⁵³ but even where the existence of an "international contract" was admitted, puzzling pretexts were advanced to protect French debtors from foreign creditors⁵⁴ and thereby to cut down the liabilities side of the French balance. In the case of French creditors, however, the concept of gold clauses was unjustifiably stretched.⁵⁵ In the troublesome post-war period, there was no other jurisdiction which so closely followed the line of national financial interest. It is comforting to note that French legal science on the whole has not participated in these quasi-patriotic efforts. On the contrary, many of the fallacies of the courts were exposed by French writers, and the basic doctrines of the French courts frequently confuted by leading French jurists.⁵⁶

⁵³ *Supra*, pp. 343, 344. Of the Suez Canal Cases, *supra*, p. 318, either one is arguable; it is their inconsistency that is shocking.

Instances of foreign debtors claiming their contract to be "domestic" are rare, of course. In some cases foreign insurance companies, obligated in gold on behalf of French policy holders, were granted the benefit of the abrogation of the gold clause: *Cour de Cassation*, June 30, 1931, *D.P.* 1931 I 140 at 144; Aug. 1, 1932, *Gazette du Palais* 1932, II 721; Appellate Court of Paris, Dec. 31, 1926, *J.D.Int.* 1927, 104. But French practice can scarcely be given credit for these decisions, since the contracts were made by the companies' French branches which had been put under French regulation and control, by a statute of March 17, 1905, in order to "frenchify" their business; *Cour de Cassation*, June 30, 1931, *supra*, and *Tribunal civil de la Seine*, April 13, 1929, *J.D.Int.* 1929, 1316. Since by virtue of French law the French branches were deprived of the benefits of the gold clauses with regard to their French investments, they were, as quasi-French enterprises, to be protected accordingly against the gold claims of the policy holders, even on a French nationalistic viewpoint. Only in the very unusual circumstances surrounding the judgment of the Appellate Court of Paris of Dec. 19, 1936, *Revue Générale des Assurances Terrestres*, 1937, 504, did the doctrine of the French courts prove comparatively unfavorable to a "frenchified" company. In this case a pre-war insurance had been taken out in German marks which subsequently depreciated to zero. Owing to the illegality of the mark-stipulation the insured eventually obtained depreciated French francs rather than nothing at all.

⁵⁴ See *infra*, sec. 34, n. 23, and particularly sec. 35, n. 44, *et seq.*; see also *infra*, p. 355, n. 110. Both the *Société du Port de Rosario* and the *Banque Hypothécaire Franco-Argentine*, *supra*, p. 338, n. 18, not protected by the courts (*supra*, p. 313, n. 1) operated abroad, although set up under French laws. They were treated like foreigners as explicitly stated, in the *Rosario* case, by *Procureur Général Matter*, *D.P.* 1931 I 17.

⁵⁵ *Supra*, p. 314 at n. 4, and p. 318 at n. 17; *infra*, sec. 35 at n. 63 and 68.

⁵⁶ Mestre and James, *La Clause-Or en Droit Français* (1926); Gény, *Revue Trimestrielle de Droit Civil*, 1926, 557; *ibid.* 1928, 5; Ri-

The breakdown of the official French doctrine was brought about by the failure of the law of 1936. Because of the very fact that this enactment was a consistent conclusion from the international payment doctrine, its failure amounted to a *reductio ad absurdum* of that doctrine. The latter was then practically abandoned by the French Government and French corporations. Relying on the United States Joint Resolution, they discontinued gold payments on their American loans,⁵⁷ contrary to the "international-contract doctrine." The government, upon an action by a French bondholder, even availed itself of its sovereign immunity.⁵⁸ By decree of June 28, 1937, all gold clauses were temporarily suspended.⁵⁹ However, the old doctrine is still employed by the courts,⁶⁰ although its use is becoming harsher and harsher due to the progressive decay of the world's currencies, including the French.

III. Attitude of the non-French Jurisdictions

In non-French jurisdictions, certain common law courts, entirely independent of the French doctrine, have held that gold clauses lose their efficacy as soon as inconvertible notes become legal tender. In the greenback period, this had been the view of the great majority of American state courts,⁶¹

vière [President of the Appellate Court of Caen] *Revue de Droit Int. privé*, 1932, 1; 2 Planiol and Ripert, *Traité Élémentaire de Droit Civil* (11th ed., 1935) no. 424; Champcommunal in *Annales du Droit Commercial*, 1926, 93. All of these considered gold and other protective clauses as not affected by *cours forcé*. Nogaro, an economist, belongs to the few leading French writers to vindicate this distinction between "international" and other contracts, *Revue Trimestrielle de Droit Civil*, 1925, 5. *Contra*: Mestre and James, *op. cit.*; Perras, *La Monnaie de Paiement et les Emprunts Extérieurs* (1932) 230, and Batiffol, *Les Conflits de Lois en Matière de Contrats* (1938) 446, 447. Further citations of French writers disapproving of decisions of French courts will be found with the citations of the decisions.

⁵⁷ Notice thereof was given, in 1937, in the New York newspapers. Up to that time, payments on French loans had been made at gold value.

⁵⁸ *Trib. civil de la Seine*, May 5, 1937, *Gazette du Palais* 1937 I 925. The French Government also invoked the Joint Resolution in this case. Canadian gold clause abrogation has recently been invoked by the *Messageries Maritimes* in respect to the company's Canadian gold loan which is guaranteed by the French Government. Prof. Jèze, *Journal des Finances* of Nov. 25, 1938, declares it "immensely regrettable" that the French Government has "incited" the debtor company to raise that defense.

⁵⁹ *Dalloz Bulletin Legislatif*, 1937, 537. The suspension lasted only three days. Decree of June 30, 1937, *ibid.* 537.

⁶⁰ *Cour de Cassation*, July 19, 1937, *D.H.* 1937, 567 (dictum); *Tribunal civil de la Seine*, March 24, 1937, *J.D.Int.* 1938, 75.

⁶¹ *Wood v. Bullens*, 6 Allen (88 Mass.) 516 (1863); *Howe v. Nickerson*, 14 Allen (96 Mass.) 400 (1867); *Rodes v. Bronson*, 34 N.Y. 649

before the Supreme Court in *Bronson v. Rodes*⁶² reached the opposite conclusion. On a similar theory the English Court of Appeal, in *Feist v. Société Intercommunale Belge d'Electricité* condemned the gold clause,⁶³ but was reversed by the House of Lords.⁶⁴ The rule laid down by the Court of Appeal is still the law in the mandated territory of New Guinea, since the High Court of Australia, in *Jolley v. Mainka*⁶⁵ relied on the reasoning of the Court of Appeal judgment, which had then not yet been reversed. It may also be noted that before the enactment of the Joint Resolution of June 5, 1933, it was contended by the Senate Committee on Banking and Currency that gold clauses were invalid.⁶⁶ The Committee's view was based on the "Thomas Amendment" of May 12, 1933,⁶⁷ which rendered all American currency legal tender. There is also some judicial authority to the same effect.⁶⁸

On the whole, however, the law is settled that *cours forcé*, in itself, does not impair gold clauses. In the early history of the United States gold and silver protective clauses were uniformly upheld.⁶⁹ Gold clauses have recently been upheld in the face of laws making paper money legal tender not only by the Supreme Court of the United States and the House of Lords, but also by the highest courts of Austria,⁷⁰

(1866), and other cases collected by Dawson, "The Gold Clause Decisions", (1935) 33 *Mich. L.R.* 674 n. 54, among them *Brown v. Welch*, 28 Ind. 116 (1866), and *Jones v. Smith*, 48 Barb. (N.Y.) 552 (1867) [referring to gold value clauses]. Only in California did the usual favor of gold prevail. *Carpentier v. Atherton*, 25 Cal. 564 (1864).

⁶² 7 Wall. (74 U.S.) 229 (1868), *supra*, p. 205, n. 37.

⁶³ [1933] 1 Ch. 684 at 696 (C.A., 1933).

⁶⁴ [1934] A.C. 161 (H. of L., 1933).

⁶⁵ 49 C.L.R. 242 (High Court of Australia, 1933). The opinion is based upon legislation passed for those parts but its reasoning probably applies to all Australia.

⁶⁶ Sen. Rep. no. 99, 73d Cong., 1st Sess.

⁶⁷ 48 Stat. 52, as amended June 5, 1933, 48 Stat. 113, 31 U.S.C. 462.

⁶⁸ See *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 198 N.E. 671 (1935) ["The Joint Resolution merely stated more specifically that which had already been enacted under the Agricultural Act (May, 1933)"]. See also *Irving Trust Co. v. Hazlewood*, 148 Misc. 456, 265 N.Y. Supp. 57 (1933).

⁶⁹ Hargreaves, *Restoring Currency Standards* (1926) 11. In *Hollingsworth v. Ogle*, 1 Dall. 257 (Pa., 1788), the court said of the year 1779 ". . . nor was it then customary to lend merely for the interest: but a practice had prevailed of making bonds payable in dollars, or for bills of exchange payable in France [francs] (*sic*).". In *Pennsylvania gold and other protective clauses* were expressly upheld by a statute of June 21, 1781, sec. 5, 1 Dallas, *Laws of Pennsylvania* 902.

⁷⁰ Opinion of the Great Senate (*Plenarbeschluss*) of Nov. 26, 1935, regarding the American bonds of the Austrian League-of-Nations Loan and the International Federal Loan, 1930, in *J.D.Int.* 1936, 442 and 717;

Denmark,⁷¹ Finland,⁷² Italy,⁷³ Czechoslovakia,⁷⁴ and others.⁷⁵ No highest court outside of France is known to this writer to have held the other way.⁷⁶ Not even the Belgian courts and the Egyptian Mixed Tribunals, both so prone to follow French legal thought, have adopted the French theory⁷⁷ although the distinction of "international" and other contracts has occa-

Judgment of June 1, 1937, *Bull. I.I.I.* 37, 245 (regarding the bonds of the Lloyd Triestino). For a discussion of the 1935 opinion, see Plesch and Domke, *Die Oesterreichische Völkerbundsanleihe* (Zürich, 1936).

⁷¹ June 21 and Oct. 6, 1933, *Ugeskrift for Retsvaesen*, 1933, p. 703, 1028; *Z.A.I.P.* 1933, p. 960, 962; see also Ussing, *Guld klausuler in Ugeskrift for Retsvaesen*, 1933, p. 264.

⁷² Jan. 18, 1933, *Z.A.I.P.* 1933, 467.

⁷³ Italian Court of Cassation, judgments of June 12, 1931, *Foro Italiano*, 1931 I 1415; April 18, 1932, *ibid.*, 1932 I 193 (gold coin clauses); May 20, 1932, *Settimana della Cassazione*, 1932, 1071 (gold value clause). After the devaluation of 1936, the same theory was used by the Appellate Court of Milan, Nov. 5, 1937, *Foro Italiano*, 1938 I 648. During the 1870's the decisions went the other way because of a different statutory set-up. *Infra*, p. 359, n. 7. Judicial restriction of gold clauses in Italy is based on a different theory, *supra*, p. 325 at n. 51.

Among Italian publications on gold clauses there may be mentioned Ascarelli, *Rivista di Diritto Internazionale*, 1929, 576; Mossa, "La clausola oro", *R.D. Comm.* 1933 II 190; Bresch, *Foro delle Venezie*, 1934, 796; Greco, *R.D. Comm.* 1935 II 532; Grassetti, *R.D. Comm.* 1936 II 387.

⁷⁴ Judgment of March 7, 1922, quoted by Sedlaček in *Zeitschrift für Ostrecht*, 1927, 346 at 348; of March 10, 1927, *ibid.*, 1929, 1364. A judgment of Jan. 22, 1936, summarized in *Z.A.I.P.* 1937, 278, construed the devaluation law of 1934 by which the old Czechoslovakian crown was replaced "in all legal relationships" by the devalued crown, as abrogating gold clauses. Because of a subsequent and contrary official comment, the court changed its attitude and again recognized gold clauses. Judgments of Dec. 10, 1936, *Prager Archiv*, 1937, 1067; June 11, 1937, *ibid.*, 1937, 2088.

⁷⁵ Appellate Court of Leeuwarden (Holland), Nov. 21, 1934, *Nederlandsche Jurisprudentie*, 1935, 333; Appellate Court of Geneva, Jan. 22, 1937, *Bull. I.I.I.* 36, 114.

⁷⁶ To the extent that gold clauses are explicitly abrogated by statute, the situation is different. Still it may be mentioned that in the interpretation of a pertinent Roumanian statute of 1916 (see *infra*, p. 357, n. 4), the Roumanian courts followed a course similar to that of the French tribunals. The Appellate Court of Bucharest, December 4, 1935, held that the statute did not protect gold debtors domiciled abroad, and the Roumanian Court of Cassation, judgment of Oct. 27, 1931, construed the statute which in terms only mentioned gold clauses, to invalidate "multiple-currency clauses" in Roumanian government bonds. See *infra*, sec. 32, n. 38, and Penciulesco, *La Monnaie de Paiement dans les Contrats Internationaux* (thesis Paris, 1937) 288, 292.

As to the Argentine law which is characterized by its peculiar gold peso concept, see *supra*, p. 320.

⁷⁷ Belgian courts do not invalidate agreements calling for payment in, or measured by foreign currency, *infra*, n. 81, nor are "international contracts", under Belgian law, generally exempt from gold clause abrogation.

As to Egyptian law, the situation of domestic gold debtors, contrary to the French system, is aggravated rather than alleviated as a result of the Egyptian notion of "franc". *Supra*, p. 319.

sionally been referred to in a few Belgian⁷⁸ and Egyptian⁷⁹ cases. As was said above, the Mixed Appellate Court of Alexandria vigorously rejected the French theory.⁸⁰ The Belgian Court of Cassation has repeatedly recognized the validity of gold value clauses (and of foreign-currency stipulations) in domestic cases.⁸¹ When, in the case of the Serbian and Brazilian loans, the Permanent Court of International Justice employed the "international contract" concept,⁸² it did so only because it held French law applicable. This part of its opinion has sometimes been grossly misinterpreted.⁸³

Sometimes the phrase "international contract", "contract of an international character", or the like is loosely used in judicial language,⁸⁴ but such use is not tantamount to ap-

⁷⁸ See, in addition to Belgian Court of Cassation, April 27, 1933, cited *supra*, p. 344, n. 47, a judgment of the Court of Antwerp, Jan. 5, 1935, *Bull. I.I.I.* 32, 93, involving the loan of the City of Antwerp, 1923, and rejecting recognition of American gold clause abrogation in terms of French theory. The Decree of April 11, 1935, *Bulletin Usuel des Lois*, 1935, 494, exempts protective clauses in loans guaranteed by the State and some other public entities from abrogation. The remark in Domke, *La Clause 'dollar or'*, (2d ed., 1935) 95, according to which the decree exempts obligations "of an international character" is not exact. Sauser-Hall, "*La clause-or dans les contrats publics et privés*" (1937) *Académie de Droit Int.*, 60 *Recueil des Cours* 711, mentions that Belgium had adopted, during a certain period, the French distinction between domestic and international contracts, but even this statement is too broad.

⁷⁹ Appellate Court of Alexandria, June 13 (18?), 1934, *supra*, p. 342, n. 39; Mixed Civil Tribunal of Cairo, Feb. 16, 1933, *J.D.Int.* 1933, 438, and June 5, 1933, *ibid.*, 1933, 1060; Mixed Civil Tribunal of Alexandria, Jan. 11, 1934, *ibid.*, 1934, 706, and other cases collected in Reiss, *Portée Internationale des Lois Interdisant la Clause-Or* (1936) 68. However, in Egypt the private rights of foreigners were, to a certain extent, guaranteed by international treaties, the so-called "Capitulations", see Reiss at 64 and *infra*, sec. 30 at n. 61. By a decree of May 2, 1935, *J.D.Int.* 1935, 1103 at 1106, the Egyptian Government has expressly abrogated gold clauses purporting "international payments", *supra*, p. 319, n. 22.

⁸⁰ *Supra*, p. 342; p. 345, n. 52.

⁸¹ Judgment of May 12, 1932, and as to foreign-currency stipulations (exchange rate guarantees) May 30, 1929, *Pasicrisie Belge*, 1932 I 167 and 1929 I 206. This view was maintained subsequently to the Belgian devaluation law of 1935. Appellate Court of Brussels, Feb. 10, 1937, *Pasicrisie Belge*, 1937 II 154 (gold value clause).

⁸² *J.D.Int.* 1929, 977 at 1007.

⁸³ *Infra*, sec. 30, n. 12.

⁸⁴ Judge Learned Hand, in *Anglo-Continental Treuhand A. G. v. St. Louis Southwestern Ry. Co.*, 81 F.(2d) 11 (C.C.A. 2d, 1936), advances the doctrine that Congress, in case of doubt, should not be supposed to have encroached, by its legislative acts, upon "international" contracts to which he applies the place-of-payment criterion. The sound result aimed at by Judge Hand could have been reached without resort to this highly dubious doctrine. *Infra*, p. 453. In the two Danish decisions mentioned *supra*, n. 71, the gold clauses were upheld. In the

proval of the French theory. The Swiss Federal Court, for example, has described an issue "in the hands of an international creditor public" as "*titre international*". At the same time the court emphasized that the term described neither a concept of Swiss law nor of finance;⁸⁵ it characterized the idea as "fluid" even in this respect.⁸⁶

A surprising version of the "international contract" doctrine, however, has recently been presented by the German legislation of 1936 which within the province of "international finance" invalidated gold clauses attached to a sum of devalued non-German currency.⁸⁷ The official commentary to the decree explains that maintenance of gold clauses is incompatible with devaluation;⁸⁸ but this statement is limited to *international* finance where the Germans were practically always debtors.⁸⁹ Thus the debtor country utilizes the international-contract theory against its foreign creditors; the creditor country against its foreign debtors. The contrast is fascinating indeed; it certainly constitutes a remarkable contribution to the administration of law in the international field.

IV. The "Tantalus" Interpretation of the Gold Clause

Another contrivance for judicial destruction of gold clauses is confined to gold coin provisions, which form, however, the great majority of all such clauses. The device is as follows: Under a gold standard, as soon as paper money is made irredeemable, gold coin ordinarily disappears from circulation. At the same time prohibitions against the export of gold and even more drastic measures are imposed. Delivery of gold coins then becomes impossible, and the debtor is thus protected against claims for gold coins. If suit is brought,

first case the international relationship was advanced as a basis for the result, in the second case, however, a purely domestic transaction was involved. See furthermore the remark of the Dutch *Hooge Raad* cited in sec. 30, n. 62.

⁸⁵ Judgment of May 23, 1928, *Amtliche Sammlung*, 54 II 257; *J.D. Int.* 1929, 497 [regarding bonds of the *Crédit Foncier Franco-Canadien*].

⁸⁶ Judgment of Feb. 11, 1931, *Amtliche Sammlung*, 57 II 69, *J.D. Int.* 1931, 510, in re bonds of the Heraclea Company.

⁸⁷ *Supra*, p. 295.

⁸⁸ *J.W.* 1936, 2020.

⁸⁹ A tendency to maintain gold clauses in domestic rather than in international relationships has also developed in Italian law. Court of Bologna, June 30, 1937, *Foro Italiano*, 1937 I 1502 at 1503.

the creditor will, of course, contend that he is not so much interested in obtaining gold coins, as in receiving currency of the value of the gold coins due. Some courts have held, however, that since only gold coin payment was stipulated, the creditor cannot be awarded the gold value in currency.

Under this interpretation, the gold coin clause, though used by business men the world over, appears the invention of dreamers or the incredibly ignorant. Protection is afforded exactly so long as it is not needed and disappears as soon as it becomes necessary. Tantalus is no longer a character of fable; he exists, by the million, in the law.

The true solution is simple and natural.⁹⁰ The "Tantalus" construction is patently preposterous. When a debtor promises to pay in gold coin, and gold coin is no longer obtainable, a secondary promise to pay the currency equivalent of the gold promised must be implied.⁹¹

The erroneous doctrine was stubbornly used after the war by the *Reichsgericht*⁹² which had been led into an im-

⁹⁰ Of course, if one shuns the natural answer, the problem might appear very much involved. Hence emphasis is laid by some of the judgments which adopt the Tantalus construction on the difficulties involved in reaching a conclusion.

⁹¹ This construction of the gold coin clause was developed by the author in "Comparative and International Aspects of American Gold Clause Abrogation", (1934) 44 *Yale L.J.* 53 at 56, and was subsequently used by the Supreme Court in *Norman v. Baltimore and Ohio R. R. Co.*, 294 U.S. 240 at 299 (1935). Post and Willard, "The power of Congress to nullify gold clauses", (1933) 46 *Harv. L.R.* 1225, 1234, had suggested five possible "reasonable" constructions of the customary American gold clause, all of them different from the one mentioned: (1) that it is a pure bullion contract; (2) that it is a single obligation to deliver gold coins containing the amount of gold as indicated by the agreement; (3) that it is an alternative obligation, with an option in the obligee to take gold coins or their value in paper dollars; (4) that it is an alternative obligation, with a corresponding option in the obligor; (5) that it is a single obligation to pay the nominal amount of the debt in any form the obligor chooses. The authors preferred the third construction. The creditor should be entitled to the nominal amount in paper currency even if the debtor, as happened in *Butler v. Horwitz*, 7 Wall. (74 U.S.) 258 (1868), and *Dewing v. Sears*, 11 Wall. (78 U.S.) 379 (1871), should insist, in case of adverse judgment, on making payment in coins. This is contrary to the above cited decisions of the Supreme Court, and unjustifiable in itself. Under the gold clause as described, the debtor has a right to make payment in gold. It may be remembered that under special conditions, as those existing in Sweden during the World War, the value of paper currency may even exceed that of gold. Cf. G. Cassel, *Money and Foreign Exchange after 1914* (1922) 79; Nolde, "La monnaie en droit international public" *Académie de Droit International*, (1929) 27 *Recueil des Cours* 247 at 386.

⁹² Judgments of Jan. 11, 1922, *R.G.Z.* 103, 384; of March 1, 1924, *ibid.* 107, 370; of May 24, 1924, *ibid.* 108, 176. The argument rests on section 245 of the German Civil Code: "If a debt has to be paid in a

passee by its decision of 1902 permitting gold clauses to be recorded freely with mortgages.⁹³ But the English Court of Appeal,⁹⁴ the High Court of Australia,⁹⁵ the Belgian Court of Cassation,⁹⁶ and several courts of first resort⁹⁷ succumbed without such excuse to the same fallacy. That a gold value clause is included in a gold coin clause has, however, been recognized by the Supreme Court of the United States,⁹⁸ the English House of Lords,⁹⁹ and by the highest courts of Austria,

particular kind of coin which is, at the time of payment, no longer in circulation, the payment must be made as if the particular kind of coin was not provided." The case of a depreciated currency is not contemplated by this provision. Depreciation was far from the imagination of the draftsmen of the Code who only intended to regulate the effect of impossibility in the situation presupposed by section 245. See Nussbaum, *Das Geld* (1925) 84. In the judgment of April 26, 1928, R.G.Z. 121, 110 the Court, answering its critics, points out that at the time of contracting the silver thalers were still legal tender (like the silver dollars in the United States, *supra*, p. 183), and that the creditors, by the gold clause, merely sought protection from "loss" through the receipt of thalers. The Court does not see that as long as the German monetary system remained intact, there could not possibly be a "loss" through the receipt of thalers, whereas, as soon as gold coin obtained a premium, the objective aimed at by the parties could only be reached by a gold value clause. Nevertheless, the Swiss Federal Council (not the Tribunal), supervisory board of the Swiss Land-Register system, has approved the theory of the *Reichsgericht*, release of Jan. 15, 1924, 20 *Schweizerische Juristenzeitung* 309. This was obviously done in order to demonstrate the futility of gold clauses and thereby to keep them off the Swiss land registers. *Supra*, p. 306, n. 25. The right theory had been used by the *Reichsgericht* in an early case, March 1, 1882, R.G.Z. 6, 125, and again recently, on May 28, 1936, J.W. 1936, 2058, when the Court without mentioning its former holdings read a tacit gold value agreement into a typical American gold coin clause.

⁹³ *Supra*, p. 329.

⁹⁴ In *Feist v. Société Intercommunale Belge*, [1933] Ch. 684 (C. A., 1933).

⁹⁵ In *Joiley v. Mainka*, 49 C.L.R. 242 (High Court of Australia, 1933), *supra*, p. 348, n. 65.

⁹⁶ Belgian Court of Cassation, June 12, 1930, *Pasicrisie Belge*, 1930 I 245; April 27, 1933, *J.D.Int.* 1933, 739. The first case is particularly puzzling since the amount payable had been articulated by the parties as *payable au cours d'or*, thus indicating a gold value clause. The Belgian decree of Aug. 2, 1914, *infra*, p. 357, n. 4, abrogating the gold clauses, was interpreted by these decisions as only referring to gold coin clauses. *Infra*, sec. 29 at n. 12.

⁹⁷ *Irving Trust Co. v. Hazlewood*, 148 Misc. 456, 265 N.Y. Supp. 57 (1933); *American Chicle Co. v. Somerville Paper Box Co.*, 50 Ont. L.R. 517 (Sup. Ct. of Ontario, 1921) [inefficacy of a gold coin clause stipulated on behalf of an American creditor, the court relying especially on a Canadian gold export prohibition]; *International Trustee for the Protection of Bondholders v. The King*, [1937] A.C. 500 at 512 (C.A., 1936), *reversed*, [1937] A.C. 500 (H. of L., 1937).

⁹⁸ *Norman v. Baltimore and Ohio R. R. Co.*, 294 U.S. 240 (1935).

⁹⁹ *Feist v. Société Intercommunale Belge d'Electricité*, [1934] A.C. 161 (H. of L., 1933). While the finding that the parties had intended to use a gold value clause ostensibly rests upon the particular circumstances of the case, the judgment is of general significance since cir-

Denmark, Finland,¹⁰⁰ the Netherlands,¹⁰¹ Sweden¹⁰² and Czechoslovakia,¹⁰³ as well as by the Permanent Court of International Justice,¹⁰⁴ and by other tribunals.¹⁰⁵ Thus the Tantalus interpretation has been rejected by the great weight of authority. As the Permanent Court well said: "Treating the gold (coin) clause to indicate merely a mode of payment, with no reference to a standard of value would not be construction but nullification of the clause"¹⁰⁶—words repeated by the Supreme Court of the United States¹⁰⁷ and by other courts.

French courts sometimes awarded the gold value to creditors who brought suit on apparent gold coin clauses,¹⁰⁸ but this was done as a matter of judicial technique rather than as a rebuttal of the Tantalus interpretation. The latter had not been advanced by the debtors because both gold coin clauses and gold value clauses were ineffective in the domestic field and effective in the international.

cumstances of the type referred to exist in practically every case of a gold coin stipulation. See *Rez v. International Trustee*, [1937] A.C. 500 at 556 (H. of L., 1937); *British and French Trust Co. v. New Brunswick Railway Co.*, [1937] 4 All E.R. 516 at 536 (C.A., 1937). However, there are some debatable points. The Court felt that the clause was a value clause because there were no gold coins in circulation at the time of contracting. This is not conclusive since the parties might have intended payment in gold coin to be made after the reestablishment of the gold standard. Again the fact that a fractional amount of the interest due is too slight to be represented in gold coin, is no argument against the existence of a pure gold coin clause, contrary to the opinion of the Court. The gold coin clause bears only on the amounts representable by gold coin, save minor remainders to be paid in other currency and unimportant for that reason.

¹⁰⁰ Case cited *supra*, p. 349, n. 72.

¹⁰¹ *Hooge Raad*, March 13, 1936, *Nederland'sche Jurisprudentie*, 1936, 497 and 506, regarding the loans of the *Royal Dutch and the Batavia'sche Petroleum Co.*

¹⁰² Judgment of Jan. 30, 1937, in *Skandia Insurance Co., Ltd. v. The Swedish National Debt Office*, *supra*, p. 41.

¹⁰³ Cases recognizing the gold clause and cited *supra*, p. 349, n. 74.

¹⁰⁴ July 12, 1929, *J.D.Int.* 1929, 977.

¹⁰⁵ Oslo Municipal Court, Nov. 17, 1936, translated in 2 *Plesch, The Gold Clauses* (1936) 91, reversed on other grounds by Supreme Court of Norway, Dec. 8, 1937, *Bull. I.I.I.* 38, 71, *Revue de Science et de Législation Financières*, 1937, 646; Greco-Bulgarian Mixed Arbitral Tribunal, Dec. 4, 1925, 6 *Recueil des Décisions des Tribunaux Mixtes* 316.

¹⁰⁶ *J.D.Int.* 1929, 977 at 996.

¹⁰⁷ In *Norman v. Baltimore and Ohio R. R. Co.*, 294 U.S. 240 at 299 (1935).

¹⁰⁸ See, e.g., Cour de Cassation, Jan. 23, 1924, *J.D.Int.* 1924, 685; July 9, 1930, *ibid.* 1931, 124; Jan. 14, 1934, *D.P.* 1934 I 73.

V. Other Devices of Judicial Restriction of Gold Clauses

In addition to the French *cours forcé* rule and to the Tantalus interpretation the inventive genius of the courts has fashioned still other instruments to eliminate unwelcome gold clauses. We have already seen how distinct and unequivocal promises to pay gold have been nullified.¹⁰⁹ A French Appellate Court went even further, however, when in the case of a mortgage on Alsatian real estate it admitted that the contract contained a gold clause, but held it irrelevant as merely "a formula of drafting and pure routine" (*formule de rédaction et de pur style*).¹¹⁰ The imagination is staggered by results which would ensue upon the general application of such doctrine to "routine" clauses in mortgage or corporate transactions. Similarly, the way in which the Italian Court of Cassation curtailed the gold clauses cannot be approved.¹¹¹ Indeed, the whole attitude of the various high judiciaries is rather discouraging.

In conclusion, defenses of another character used to defeat gold clauses may be briefly listed. These bear upon special situations. Thus, in periods of depreciation shrewd money lenders will sometimes grant loans upon the condition that the depreciated paper money lent shall be restored in gold of the same nominal value or in currency equal to this gold value. Whether such contracts are or are not usurious will depend to a great extent on the degree of depreciation existing at the time of the loan.¹¹² More interesting is a ruling

¹⁰⁹ *Supra*, p. 322.

¹¹⁰ *Tribunal Supérieur* of Colmar, Nov. 20, 1921, *Revue Juridique d'Alsace et de Lorraine*, 1922, 97 [Alsatian plaintiff who, after the armistice, had acquired the mortgage from a German mortgagee]. The same surprising theory in *Tribunal civil de la Seine*, April 6, 1927, *D.H.* 1927, 296. *Cf. In re Missouri Pacific Ry.*, 7 F. Supp. 1 (D.C. Mo., 1934) [recognizing a gold clause while at the same time emphasizing its routine character].

¹¹¹ *Supra*, p. 325.

¹¹² Loans made in depreciated greenbacks to be discharged in gold dollars of the same nominal amount generally have been held usurious. *Tyng v. Commercial Warehouse Co.*, 58 N.Y. 308 (1874). *Cf. Stark & Wales v. Coffin*, 105 Mass. 328 (1870). The cases are collected in *American Digest, Century Ed.* sub tit. "Usury", secs. 35 and 45. In a recent federal case [*In re Mansfield Steel Corporation*, 30 F.(2d) 832 (D.C. Mich., 1929)] a loan was given in Canadian dollars then at a discount, to be repaid in United States dollars. Held: no usury, though the maximum interest rate was charged. In analogous cases the Appellate

of the German Cartel Court which was created after the World War in order to remedy abuses resulting from industrial combinations. In 1931 certain German manufacturers had agreed to sell their products only on a "gold-mark" basis. Such an agreement was not then unlawful in itself, but the Association of German Department-Stores objected strongly to this agreement, and resolved to boycott the manufacturers until they abandoned "gold-mark" pricing. On a suit brought by the manufacturers the Cartel Court held that the boycott did not unreasonably impair the economic freedom of the manufacturers, since the general use of the gold clause might be expected to provoke and spread distrust in the German currency.¹¹³ The decision was certainly warranted and indicates a serious danger in the use of the clause. But such danger as was shown is not a sufficient reason for invalidating the clause itself. Gold (value) clauses have been recognized even in the face of exchange-control.¹¹⁴

SECTION 29

LEGISLATIVE RESTRICTION OF GOLD CLAUSES

I. Comparative Survey

As was shown in the last section, the objections to gold clauses although insufficient to warrant judicial avoidance,

Court of Milan, July 19, 1934, *R.D. Comm.* 1935 II 531 at 540, held valid the promise to repay in gold, while the Appellate Court of Berlin (*Kammergericht*) convicted the lender of usury, judgment of Sept. 22, 1922, *Leipziger Zeitschrift*, 1922, 658.

In *Hollingsworth v. Ogle*, 1 Dall. 257 (Pa., 1788), a loan had been given in depreciated continentals. The debtor gave a note payable in hard money for forty per cent of the nominal value of the sum received, this amounting to eight times the metallic value. The Court held that this arrangement was not necessarily usurious since it protected the creditor against depreciation and the debtor against an appreciation beyond forty per cent. The Court, however, denied a recovery of more than twice the metallic value of the continentals given.

¹¹³ Judgment of Dec. 17, 1931, *J.W.* 1932, 765. Following a similar line of thought, the German Minister of National Economy later on warned the electricity firms against inserting gold clauses into their contracts, *Deutscher Reichsanzeiger* of Dec. 5, 1936.

¹¹⁴ Thus explicitly Appellate Court of Hamburg, Nov. 19, 1937, *Hanseatische Rechts-und Gerichtszeitschrift*, 1937 B 439. Generally the existence of exchange control is not even mentioned in the recent gold clause cases of Germany (*supra*, p. 320, n. 24, *infra*, p. 361, n. 22), Czechoslovakia (*supra*, p. 349, n. 74) and Poland, (*supra*, p. 325, n. 47), all of them being under such control.

may yet justify legislative encroachment. Legislative interference with gold clauses has, in fact, occurred for centuries. A statute abrogating gold clauses was enacted in Venice as early as 1517.¹ France knew similar prohibitions during the John Law adventure.² However, the World War and the post-war monetary crises initiated the great era of gold clause restriction.³ There were two successive waves of restriction. The first was directly caused by the war and its aftermaths,⁴ the second and much more important one, by the world monetary crisis which broke out in 1931.⁵ In the second movement, some countries merely restored or expanded the earlier enactments.

¹ L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891) 312 n. 54. In England under an ordinance of 1429 foreign merchants were forbidden to demand payment in gold coin or to refuse payment in silver, Breckenridge, *Legal Tender* (1903) 38.

² *Supra*, p. 336, n. 5.

³ In accord with common usage, we do not include cessation of gold redemption of banknotes in "gold clause abrogation". Such redemption presents different features indeed. See *supra*, p. 81. On the other hand, there are some similarities. In fact, injury done to note-holders by discontinuance of redemption is legally comparable to injury done to creditors through abrogation of gold clauses proper.

⁴ *Belgium*, Aug. 2, 1914, *Bulletin Usuel des Lois*, 1914, 456, upheld by Decree of Oct. 25, 1926, art. 7, *ibid.* 1926, 277 at 278 ["Monetary and Central Bank Laws of Belgium", League of Nations, *Economic Intelligence Service* (1932) no. 3, p. 27]; *Bulgaria*, May 12, 1921, *Barron's* of June 6, 1932, p. 10; *Egypt*, Aug. 2, 1914, *J.D.Int.* 1933, 1063 at 1065 and *ibid.* 1935, 1103; *Germany*, Sept. 28, 1914, *R.G.Bl.* 1914, 417; *Greece*, July 21, 1914, Dec. 23-30, 1914, May 11-15, 1917 (abrogating gold clauses, a law of May 15, 1923 permitting future gold value clauses, see Ténékidès, *J.D.Int.* 1923, 1014); *Italy*, several decrees issued from 1916-1921, [tr. in Nussbaum, *Vertraglicher Schutz gegen Schwankungen des Geldwerts* (1928) 80], repealed by decree of March 30, 1928, no. 573, *Raccolta Ufficiale*, 1928 I 1073; *Jugoslavia*, April 24, 1920, quoted by the Supreme Court of Austria in the judgment of Oct. 9, 1930, *Die Rechtsprechung*, 1931, 11 at 13; *Roumania*, Dec. 21, 1916, see Nussbaum, *loc. cit.* 84 (German translation).

The clearing procedure of the Peace Treaties of Versailles, St. Germain, Trianon and Neuilly, *supra*, p. 296, n. 63, carried with it an abrogation of gold clauses through the compulsory conversion of debts into the currency of the victorious power. Thus, the French-German Mixed Arbitral Tribunal awarded to a French gold dollar creditor of a German debtor depreciated francs computed on the pre-war parity. Judgment of April 10, 1924, 4 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 400. There were special restrictions upon gold clauses in life insurance policies, see *Assicurazione Generali v. Selim Cotran*, [1932] A.C. 268 (Privy Council, 1931).

⁵ *Argentina*, see *supra*, p. 320, n. 30. *Australia*: New South Wales, Act 14 of 1934; *Austria*, series of ordinances of 1933, replaced by the Gold Clauses Act of April 27, 1937, *Bundesgesetzblatt*, 1937, no. 130 (*J.D.Int.* 1937, 643, see also *infra*, p. 360); *Belgium*, April 11, 1935, *Bulletin Usuel des Lois*, 1935, 494 (see Moreau, *La Clause Or*, 1935), and as to the measures taken in the case of Belgium Government gold bonds, *infra*, sec. 30, n. 45; *Brazil*, Nov. 27, 1933, no. 23501, *Bull. I.I.I.* 30, 261; *Canada*, April 10, 1937, *ibid.* 37, 109 [supplementary statutes

In the first phase, the German and the Belgian Laws of 1914 are outstanding. The climax of the second one was the United States Joint Resolution of June 5, 1933.⁶ In legal his-

were enacted by Canadian provinces such as Manitoba, Laws of 1937, c. 17, *Bull. I.I.I.* 37, 110; New Brunswick, Laws of 1937, c. 45, cited [1937] 4 *All. E.R.* 520, and Quebec, Laws of 1937, c. 10, *Bull. I.I.I.* 38, 65; Chile, April 18, 1932, no. 5,107, 101 *Boletín de Leyes de Chile*, I 659, *infra*, sec. 29, n. 20; Colombia, Act of 1933, no. 46, referred to in the case cited *supra*, p. 5, n. 22; Costa Rica, Jan. 15, 1932, *La Gaceta*, Jan. 16, 1932 [mentioning only foreign currency clauses but probably applicable to gold clauses, especially to "gold-dollar" and similar clauses, as were the Greek decrees referred to by Ténékidès]; Cuba, May 22, 1934, *Gaceta Oficial*, May 23, 1934; Danzig, May 2, 1935, *Gesetzblatt für die Freie Stadt Danzig*, 1935, 617, as amended *ibid.* pp. 797, 991; Denmark, Nov. 27, 1936 (No. 254), *Bull. I.I.I.* 36, 84 and 97; Ecuador, Decree of Dec. 16, 1932, *Registro Oficial*, Dec. 29, 1932, p. 3; Egypt, May 2, 1935, *J.D.Int.* 1935, 1103 at 1106; Estonia, July, 1933, see Barry, "Gold", (1934) 20 *Va. L.R.* 263 at 303, n. 81; Germany, June 26, 1936, *R.G.Bl.* 1936 I 515; Dec. 5, 1936, *R.G.Bl.* 1936 I 1010; Nov. 24, 1937, *R.G.Bl.* 1937 I 1305, all of them limited to certain types of gold clauses; Greece, July 29, 1932, and August 1, 1935 (see Ténékidès in *Bull. I.I.I.* 28, 241 at 249 and *J.D.Int.* 1936, 1020 at 1022; *ibid.* 1937, 159; cases revealing a strong pro-debtor trend in *J.D.Int.* 1938, 122 *et seq.*); Guatemala, April 26, 1934, *Diario de Centro America*, May 3, 1934; Honduras, Decree no. 141 of 1934; Hungary, Aug. 28, 1931, Law no. 4600/1931 (German translation in *Das Devisenrecht der Welt* [1932] 94); Luxembourg, Decree of May 14, 1935, *Bull. I.I.I.* 33, 108; Mexico, July 27, 1931, *Diario Oficial de Mexico*, July 27, 1931, no. 23 as amended on April 26, 1935, *ibid.*, April 27, 1935, no. 50; Netherlands, May 24, 1937, *Staatsblad*, 1937, no. 204 (also *Bull. I.I.I.*, 36, 313; 37, 144; for a collection and translation of prior Dutch cases, see Sack and Meyer-Collings, *Gold und Valuta Klausel* [1937]; *Dutch Indies*, Oct. 28, 1937, *Bull. I.I.I.* 38, 282; Paraguay, see U. S. Dept. of Commerce, *Handbook of Foreign Currencies* (1936), 159; Poland, June 12, 1934 (see Domke, 1934 *Bulletin de la Société de la Législation Comparée* 365; *Bull. I.I.I.* 36, 352, and cases collected by Bossowski in (1936) 3 *Zeitschrift für Osteuropäisches Recht* (New Series) 410 and (1938) 4 *ibid.* 513); El Salvador, Decree of May 31, 1933, see *Handbook of Foreign Currencies* (1936) 182; Sweden, June 17, 1932, *Svensk Författningsamling*, 1932, no. 212; Turkey, mentioned in the argument of *Procureur Général* Matter in the *Heraclea Case*, *J.D.Int.* 1932, 408; (see also *Kricorian v. Ottoman Bank*, 48 T.L.R. 247 [K.B. 1932]); *Union of South Africa*, Act no. 8 of 1933.

⁶ 48 Stat. 112; 31 U.S.C. 463. Its essential provisions read as follows: (a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law. (b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term

tory there is probably no other statute of a purely-private-law character which has engendered such enormous financial changes, and which, although national in itself, has at the same time caused such tremendous international repercussions.

The statutes in question vary widely not only in phraseology⁷ but in legal scope.⁸ Some of them, such as the American Joint Resolution and the German and Belgian statutes, regulate gold clauses only,⁹ others include debts couched in terms of foreign currency. The regulations may affect all types of gold clauses or only some of them. Thus the American and the Dutch statutes cover merely clauses coupled with dollars or guilders, respectively. The Belgian law of 1935 deals only with leases and loans. The Swedish law of 1932 is confined to bonds issued in Sweden before September 28, 1931,¹⁰ and the Danish law to Danish bonds before September 29, 1931. The Dutch law, in addition to other limitations, exempts all gold loans quoted on the Amsterdam Stock Exchange. Italian legislative abrogation of gold clauses was con-

"coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations. . . .

⁷ During the French Revolution gold clauses were suppressed simply by adding to the provision rendering paper money legal tender, the phrase "notwithstanding any agreement to the contrary", *supra*, p. 336. This formula sometimes recurs in Latin legislation, but its significance is no longer certain. The old meaning is preserved in the Belgian and in the Egyptian ordinances of 1914 (the former Egyptian legislation being essentially French in character) and in the Italian legislation of the sixties. See Court of Cassation of Naples, Oct. 18, 1873; of Florence, Dec. 18, 1873; Dec. 10, 1874, *J.D.Int.* 1875, 229; of Palermo, Feb. 19, 1875, *ibid.*, 1875, 230; of Naples, May 2 and 11, 1876, *ibid.*, 1877, 84; Rome, Aug. 8, 1876, *ibid.*, 1877, 85. Still the Italian decree of Dec. 21, 1927, n. 2325, art. 2, par. 2, *Raccolta Ufficiale*, 1927 IV 4869 (tr. 1928 *Fed. Reserve Bulletin* 642) re-establishing convertibility of bank notes only refers to agreements barring the use of lira-notes as legal tender. It seems to indicate that the former rules providing for the validity of gold clauses were not changed. Ascarelli, "*Clausola oro e stabilizzazione della moneta*", *Rivista di Diritto Internazionale*, 1929, 576 at 583. Recently Italian courts have cut down the gold clauses. See *supra*, p. 325, n. 51.

⁸ See Domke, "*Les efforts legislatifs tendant à restreindre la validité de la clause-or*", *Revue Critique de Droit International*, 1938, 22.

⁹ Except that silver dollar clauses are probably hit by the language of the American Joint Resolution, because they call for "payment in a particular kind of currency." The silver "bullion" clause of the *Holyoke* case, *supra*, p. 303, n. 8, decided on Dec. 15, 1933, is likewise void under Justice Cardozo's theory on sham gold clauses in the other *Holyoke* case, *supra*, p. 309.

¹⁰ Even where this law does not apply there seems to be little hope for the recognition of gold clauses by Swedish courts, *supra*, p. 323, n. 38.

fined to pre-war loans of certain public utilities.¹¹ The German and the Belgian laws of 1914 have been interpreted as bearing only on gold coin clauses.¹² Several statutes are of a retaliatory character.¹³ Some, such as the German and the Danish, are termed provisional, but this is only the expression of the legislature's hope of repeal and lacks legal relevancy.¹⁴

Austrian law is outstanding for its intricacy. Despite monetary hardship and exchange control, the Austrian Supreme Court, in a remarkably independent spirit, upheld, as late as 1933, obligations couched in terms of gold or foreign currency.¹⁵ The government therefore did not seek arbitrarily to strike out the gold clauses which in fact were unbearable to Austrian debtors, but tried to find a middle ground, recognizing the gold obligation in principle, but rendering it more or less ineffectual by means of moratoria having no fixed terms, and by other limitations. This extremely complicated regulation was replaced in 1937 by another which, despite numerous qualifications, comes nearer to direct abrogation.¹⁶

A more indirect device for invalidating gold clauses is presented by a Norwegian law of December 15, 1923.¹⁷ Under this law the creditor remains entitled to demand gold payment, but is under a double legal penalty if he does so; the debtor upon such demand is given the right to defer gold payment until the Bank of Norway shall have resumed redemption of its notes in gold, and in case the creditor should withdraw his refusal to receive notes, he has to wait three months for payment. This device reminds us somewhat of the wild-cat banking period in Kentucky.¹⁸

¹¹ *Supra*, n. 4.

¹² *Reichsgericht*, May 24, 1924, *R.G.Z.* 108, 176; April 26, 1928, *ibid.* 121, 110, and the Belgian cases, p. 353, n. 96. The sounder view certainly is to include gold value clauses in a prohibition of this type, considering the legislative intent. This was done by the Supreme Court of Colombia, April 28, 1937, 44 *Gaceta Judicial* 640.

¹³ *Infra*, sec. 30 at n. 64-67.

¹⁴ See the analogous provisos mentioned *supra*, p. 83, n. 33.

¹⁵ Judgment of Feb. 1, 1933, *Die Rechtsprechung*, 1933, 45.

¹⁶ See Loeb, *Die Regelung der Fremdwährungs- und Goldschuldverhältnisse*, 1937. Short surveys are to be found in *Z.A.I.P.* 1934, 464 on the 1933 legislation; in 2 *Oesterreichische Zeitschrift für Bankwesen* 175 (by Löbl) on the 1937 legislation, and on the entire development of the pertinent Austrian legislation in Janda, *Die Entwicklung der österreichischen Goldklauselgesetzgebung*, *J.W.* 1938, 2598.

¹⁷ *Almindelig Norsk Lovsamling* 1920-1923, 1468, English translation, U. S. Department of Commerce, *Handbook of Foreign Currencies* (1936) 152.

¹⁸ *Supra*, p. 45, n. 46.

Not many countries have abstained from judicial or legislative restriction of gold clauses. Among the countries which have not are England, some of her possessions such as India, and Switzerland,¹⁹ the reason being that the clauses have little significance in those countries. In Chile, gold clauses stipulated before April 19, 1932, have been judicially maintained as gold value clauses.²⁰ Ostensibly gold clauses are still frequent in Germany due to the fact that the old mark debts have been revalued in terms of gold marks,²¹ the government obviously feeling uneasy about touching upon this sore spot.²² Still the clauses have been practically abolished in foreign dealings,²³ and pre-war clauses were done away with by the decree of 1914 and by the Tantalus interpretation.²⁴ The clauses still in force have hardly any real significance. Under existing exchange control, the official parity of the mark must be used in the conversion of gold marks rendering a gold mark equal to a reichsmark, a fiction that will undoubtedly be maintained if the mark should depreciate further.

II. Constitutionality of American Gold Clause Abrogation²⁵

Gold clause abrogation, impairing so greatly the rights of creditors, was bound to be challenged on every available

¹⁹ Swiss Federal Tribunal, Feb. 1, 1938, *Ämtliche Sammlung* 64 II 88 at 101; Appellate Court (*Cour de Justice Civile*) of Geneva, Jan. 22, 1937, *Bull. I.I.I.* 37, 114; Superior Court of Zurich, Sept. 17, 1937 (1938) 35 *Schweizerische Juristenzeitung* 155; Henggeler, "Die Abwertung des Schweizerfrankens", *Zeitschrift für Schweizerisches Recht*, 1937, 158a at 196a; Guisan, "La dévaluation du franc suisse et ses effets de droit civil", *ibid.*, 1937, 260a at 276a. As to the indirect suppression of gold clauses in mortgage deeds, *supra*, p. 353, n. 92.

²⁰ Judgment of Jan. 8, 1938 (1 *Comparative Law Series* [U. S. Dept. of Commerce] New Series 84) construing Chilean law No. 5107 of April 18, 1932, sec. 14, *supra*, p. 358, n. 5. However, the creditor is still subject to exchange control.

²¹ *Supra*, p. 281.

²² A limited number of agricultural gold mortgage clauses were affected by the decree of 1937, cited *supra*, p. 358, n. 5. A recent instance of recognition of gold clauses is *Reichsgericht*, April 11, 1938, *J.W.* 1938, 2135.

²³ Through the 1936 enactments, *supra*, p. 295. Jürgensen, "Immer noch Währungsschutzklauseln", *J.W.* 1937, 2947, and other recent German writers regard the disfavor of gold clauses as a specifically national-socialist attitude.

²⁴ See *supra*, p. 352.

²⁵ a. *Literature preceding the Gold Clause Decisions*: Barry, "Gold" (1934) 20 *Va. L.R.* 263; Collier, "Gold Contracts and legislative power",

legal ground. An attack on the Joint Resolution was particularly to be expected because of the enormous interests involved and the unique opportunities for invalidation offered by the broad canons of the American Constitution. In the three *Gold Clause Cases*, the Supreme Court practically sustained the efficacy of the Joint Resolution by a five to four vote.

In the first case, *Norman v. Baltimore and Ohio R. R. Co.*,²⁶ the plaintiff brought suit on a 22.50 gold-dollar coupon of defendant's gold bond, claiming alternatively \$22.50 in gold or its equivalent, \$38.10, in legal tender. The Court dismissed the action, holding that gold clause abrogation was constitutional as to private debts. The Court found no difficulty in holding that the power of Congress "to establish a monetary system" included the power to requisition gold coin and thereby to affect gold coin clauses. As to the gold value clause, secondarily contained in a gold coin clause,²⁷ and thus in the defendant's coupon, the Court pointed out that the annulment of such clauses served to maintain "a uniform monetary sys-

(1934) 2 *Geo. Wash. L.R.* 303; Hanna, "Currency control and private property", (1933) 33 *Col. L.R.* 617; Nebolsine, "The Gold Clause in private contracts", (1933) 42 *Yale L.J.* 1051; Nussbaum, "Comparative and international aspects of American Gold Clause abrogation", (1934) 43 *Yale L.J.* 53; Post and Willard, "The power of Congress to nullify Gold Clauses", (1933) 46 *Harv. L.R.* 1225; Rothenburg and Bowers, "Economic and legal aspects of the Gold Clause dilemma", (1933) 1 *Geo. Wash. L.R.* 493; Thorpe, "Contracts payable in gold", *Sen. Doc.* No. 43, 73d Congress 1st Session 1933; Zerkovich, "Effect of Gold Clauses under recent legislation", (1935) 29 *Ill. L.R.* 635. Cf. the briefs prepared by the United States Government in *U. S. v. Bankers Trust Co.*, Oct. Term, 1934, Nos. 471 and 472, *Nortz v. U. S.*, Oct. Term, 1934, No. 531, and *Perry v. U. S.*, Oct. Term, 1934, No. 532, containing a wealth of valuable material.

b. *Literature subsequent to the Gold Clause Decisions*: Carpenter, "The Gold Clause Cases", (1935) 8 *So. Cal. L.R.* 181; Dawson, "Gold Clause decisions", (1935) 33 *Mich. L.R.* 647; Dickinson, "The Gold decisions" (1935) 83 *U. of Pa. L.R.* 715; Eder, "The Gold Clause Cases in the light of history", (1935) 23 *Geo. L.J.* 359, 722; Hart, "The Gold Clause in United States bonds", (1935) 48 *Harv. L.R.* 1057 [an unusually acute and penetrating analysis; though sometimes perhaps overpointed, it is one of the most valuable contributions to the gold clause problem]; Zerkovich, "Historical Critique of the Gold Clause Decisions", (1935) 29 *Ill. L.R.* 1058; Pennock, "The Private Bond Case as a postponement of the real issue", (1936) 84 *U. of Pa. L.R.* 194; Collier, "Gold Contracts and currency regulation", (1938) 23 *Corn. L.Q.* 520.

For the literature on the International Law and Conflicts Aspects of the Joint Resolution, see *infra*, sec. 30, n. 1.

²⁶ 294 U.S. 240 (1935). This decision covers the companion case, *U. S. v. Bankers Trust Co.*, Oct. Term, 1934, Nos. 471, 472.

²⁷ *Supra*, p. 353, n. 98.

tem, and to reject a dual system".²⁸ When the Joint Resolution was passed, devaluation, the Court said, was not yet accomplished but was in prospect. Anticipating, however, the determination to be made of the value of the currency, Congress was justified in striking down private agreements interfering with its policy of a uniform currency.

By this argument the Court put its decision squarely on technical monetary grounds, avoiding a possibly perilous expansion of Congressional powers.²⁹ Yet the justification offered by the Court is open to objection. No question of "dual currency" was raised by gold value clauses, which merely bear upon the sum owed.³⁰ And the emphasis laid upon the forthcoming "devaluation" is, perhaps, somewhat far-fetched. It seems more natural to interpret the Joint Resolution in terms of what did happen rather than in terms of what might have happened in the future. In fact the Act is justifiable, without resort to devaluation, on the ground of the previous abandonment of the gold standard. After that step was taken in March, 1933, the Joint Resolution was passed to put each and every dollar-creditor on the same level, hence to compel all creditors to share equally in monetary losses brought about by a national emergency, rather than to permit them to protect themselves by routine clauses valid in law but objectionable from the viewpoint of legislative policy. The fact that American courts during the greenback period believed and that French courts still believe that *cours forcé, eo ipso*, results in annulment of gold clauses, brings home the close relationship between that annulment and monetary regulation, and consequently points the bearing which the annulment has on the currency power of Congress. Certainly under this theory the currency power may invade the law of contracts, and indeed, this has long been recognized.³¹

In *Perry v. United States*,³² the third gold clause case to be reported, the plaintiff, holder of a \$10,000 United States Liberty Bond of 1917, claimed \$16,931.25 on the gold clause of the bond. The Court held the Joint Resolution unconstitutional in so far as it abrogated gold clauses in the bonds of

²⁸ 294 U.S. 240 at 316 (1935).

²⁹ The Joint Resolution, in its preamble, invokes the value-regulating clause. As to the latter, see *supra*, p. 208.

³⁰ *Supra*, p. 145.

³¹ *Supra*, p. 212, n. 3.

³² 294 U.S. 330 (1935).

the government. While Congress, under the Constitution, has power to borrow money on the credit of the United States, it has not been vested, the court held, with authority to alter or destroy the obligation resulting therefrom. The opposite contention of the government "necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that when the Government borrows money, the Credit of the United States is an illusory pledge. We do not so read the Constitution."³³

One might expect, after such strong language, that the United States would have been held liable to pay the plaintiff \$16,931.25 and to the holders of gold bonds 34 billion dollars instead of 20 billions besides 1,200 million dollars yearly interest instead of 700 millions.³⁴ The effects on the already unbalanced federal budget would have been catastrophic and it would have been impossible to carry out such a decision.³⁵ As a matter of fact the Court did not award the \$16,931.25 demanded. In assessing damages the Court observed that the plaintiff was not entitled to obtain gold coin for recourse to foreign markets or for dealings in foreign exchange. Nor was there a free domestic market for gold. Under these circumstances the "equivalent" of the gold coin promised could only be ascertained in terms of purchasing power and in view of domestic transactions. The plaintiff had not shown any loss whatever in these respects. The damages demanded would therefore "constitute not a recoupment of loss in any proper sense but an unjustified enrichment".³⁶

The subtle theory of the Court seems to be that under pressure of emergency the implied gold value clause had been recast into a clause purporting indemnification for loss in purchasing power.³⁷ This conclusion, however, was not proved

³³ Judgment in the preceding note, at 250.

³⁴ The figures are taken from the government's brief in the *Perry* case, p. 13. The judgment states that the amount of outstanding bonds had been reduced to approximately 12 billion dollars. However in the case of unconstitutionality of the Joint Resolution the owner of the redeemed bonds would possibly have been entitled to additional payments.

³⁵ It was positively reported, and not contradicted that President Roosevelt had decided, in the contingency of an adverse judgment, to go before the people and to declare that it would be factually impossible to carry out the decision. *New York Times*, Feb. 21, 1935.

³⁶ 294 U.S. 330 at 358 (1935).

³⁷ The gold clause of the Liberty bonds read: "gold coin of the present standard of value". It is at variance with the customary phrase

by the Court. It is true that the plaintiff could not use his gold in foreign markets or to deal in foreign currency. Still, it is with thought to the contingency of domestic monetary emergencies and legislation that gold value clauses are agreed upon. The creditor, apprehensive that he may be unable to obtain and to realize on gold, intends to get at least the true value of gold in legal tender, that is, the value in the world market if "a domestic market for gold is not existent". The Court did not, and could not contend that such a proviso was void, except under the Joint Resolution, the validity of which had been denied. Interpreting the clause as the Court did, is "not a construction, but a nullification of the clause". It is, in fact, the "Tantalus" interpretation which was adopted by the Court, tempered by a "purchasing power" allowance. But that allowance is practically negligible. So far as losses in purchasing power are concerned, nearly all imaginable plaintiffs are in exactly the same situation as was Mr. Perry. Only foreign bondholders, it seems, might be able to prove a loss in purchasing power. One is reminded of the civil law treatment of foreign creditors in case of *mora* (default) of their debtors.³⁸ But the validity of the analogy is by no means certain. The foreign holder of a Liberty bond is also subject to the restrictions referred to by the Court; the place of gold payment being Washington, he could neither export nor even receive the gold.

In conclusion, the damages theoretically awarded by the Court amount to nothing.³⁹

"gold coin of the present standard of weight and fineness", but this diversity is entirely irrelevant and was not referred to by the Court. See Hart, *loc. cit. supra*, n. 25(b), at 1084.

³⁸ *Supra*, p. 258. See also Fenwick in (1935) 29 *American Journal of Int. Law* 310, and as to the rights of foreign owners of American currency, *infra*, p. 387. However, Professor Jèze is mistaken in ascribing to the minority of the Court the declaration that the reasoning of the majority is invalid for foreign holders of American gold bonds. Jèze, "*Défaillances d'Etat*" in *Académie de Droit Int.*, (1935) 53 *Recueil des Cours* 377 at 414.

³⁹ The obscurity of the *Perry* case made itself felt when subsequently to the Joint Resolution the American Government began to call for payment the outstanding Liberty bonds, all of them gold bonds and bearing interest at the relatively high rate of 3½ per cent. Notice of redemption, under the terms of the bonds, stops running of interest. In *Machen v. United States*, 87 F.(2d) 594 (C.C.A. 4th, 1937), the plaintiff, holder of a Liberty bond, claimed that the gold clause being still valid under *Perry v. United States*, notice of redemption can stop interest only if aimed at a payment to the bondholder of the full gold value. The Court allowed the interest claim. It misunderstood *Perry v. United States* to mean that the government is still liable to pay the

The third of the gold clause cases, *Nortz v. United States*,⁴⁰ which is the second in the official series, is of a different character. Nortz, former owner of \$106,300 in gold certificates delivered by him to the government on January 17, 1934, claimed the sum of \$64,334.07 in addition to the \$106,300 received as the nominal equivalent of the gold coin. The Joint Resolution was not involved in this case since the Act, in terms, excepts "currency" from the "obligations" affected.⁴¹ Thus, no real gold clause was presented. However, the plaintiff contended that having delivered the certificates under the laws and decrees requiring such delivery,⁴² he was entitled to the indemnification claimed. Judgment was for the defendant on the ground that on January 17, 1934, the legal parity of the dollar had not yet been changed.⁴³ By January 31, 1934, the day of devaluation, practically all gold coin, gold bullion and, with some limitations, gold certificates, had been requisitioned. Since the Court held the requisition day decisive, it thus disposed of the possible claims of practically all of the former owners. Juridically, however, the position taken by the Court is untenable. A superseded parity which still stands in the statute books, but which does not possess any actual significance, is irrelevant in the assessment of damages.⁴⁴

In fact the Court suggests still another line of reasoning: "Had plaintiff received gold coin for certificates, he would not have been able, in view of the legislative prohibition, to export it or to deal in it." This viewpoint is the same as that of the *Perry* case; where no loss in purchasing power is proved, there are no damages. The argument is even stronger in the *Nortz* case, because here it is not adulterated by a fallacious interpretation of the gold clause. Being basic to both cases, it permits conclusions from one to the other

full gold value rather than to indemnify the holder for a loss in purchasing power, which loss however was not set forth by the plaintiff. The Supreme Court reversed in *Smyth v. United States*, 302 U.S. 329 (1937), on other grounds, avoiding an interpretation of the *Perry* case. Mr. Justice Stone, concurring, pointed to the necessity to overrule the *Perry* case.

⁴⁰ 294 U.S. 317 (1935).

⁴¹ On the "warehouse-receipt" feature of gold certificates, *supra*, p. 86.

⁴² *Supra*, p. 70, n. 41.

⁴³ The same theory underlies the *Gold Reserve Act* of Jan. 30, 1934, sec. 2(a), 48 Stat. 337, 31 U.S.C. 441, which with immediate effect vests the title in the gold holdings of the Federal Reserve Banks in the United States. *Supra*, p. 186, n. 6.

⁴⁴ *Supra*, p. 255.

case. The interpretation of the purchasing-power theory of the Supreme Court in favor of foreigners is made still more improbable by its consequences in the *Nortz* case. For it is unimaginable that foreign holders of gold certificates should be preferred over American holders.

As a matter of fact the holders of gold certificates had been deprived of their right to receive gold coin as early as the President's Proclamation on March 6, 1933, and the Emergency Banking Act of March 9, 1933.⁴⁵ When the Court handed down its judgment these measures had become final.⁴⁶ If injury was suffered, it was on March 6, 1933, but on that date there could have been no question of a loss in purchasing power of the dollar. It is surprising that the government did not make this point. Its legal significance consists in shifting further back the decisive day for the computation of damages. The argument that there was no loss in purchasing power, would thereby have been strengthened.

The denial of claims exceeding the face amount of the currency affected also applies, of course, to the holders of Federal Reserve Notes, which are United States obligations,⁴⁷ and to United States notes, all of which were made irredeemable in March, 1933. Under the theory of the minority of the court, the holders of these notes, too, would have been entitled to compensation on the basis of world-gold prices. The minority did not expressly mention these situations, but since they involve legislative destruction of contractual rights to receive gold they come under the theory of the minority as well as does the *Nortz* case. This consequence demonstrates the absurdity of the minority position.

The manifold doubts raised by the gold clause cases with regard to the obligations of the American government have been practically resolved by a Joint Resolution of August 27, 1935, withdrawing the right to sue the government, after January 1, 1936, for any seizure of coin, currency, bullion, or upon government gold-clause securities.⁴⁸

⁴⁵ *Supra*, p. 185, n. 3.

⁴⁶ By incorporation into the *Gold Reserve Act* of Jan. 30, 1934, sec. 6, 48 Stat. 337 at 340, 31 U.S.C., sec. 408a.

⁴⁷ *Supra*, p. 80, n. 20.

⁴⁸ 49 Stat. 938 at 939, 31 U.S.C. 773b. The Act also authorizes the Secretary of the Treasury to exchange "coins or currencies" of the United States for "other coins or currencies which may be lawfully acquired" and within a certain time to make immediate payment in dollars to owners of gold clause securities of the United States, even

That action has not ended, and will not end the discussion of the cases, and particularly of the *Perry* case. The grounds on which the Joint Resolution of June 5, 1933, was held unconstitutional as to governmental obligations have been strongly criticized by American writers.⁴⁹ This is chiefly due to the sensational features of the *Perry* case. Its incongruities have a significance exceeding the strictly legal field. The acknowledgment by the Court that the "Perrys" were striving for an "unjust enrichment" obviously justifies the work of Congress. It offsets the unmistakable censure upon the government, which was greatly aggravated by the assumption that Congress was "disregarding the obligations of the government at its discretion".⁵⁰ No finding warranted such an assumption, and it was firmly denied by Mr. Justice Stone in a compact and extraordinarily impressive concurring opinion. Congress wanted no more than to have the government participate in benefits accruing to every debtor from general monetary measures. Thus in a case of world-wide importance and attention, the Court inveighed unjustifiably against its own government. That the censorious majority opinion⁵¹ should have found supporters in both wings of the Court awakes interesting speculations concerning the intellectual compromises occasionally required of the judiciary in order to obtain sound results in critical situations.

The dissenting opinion read by Mr. Justice McReynolds for himself and for three colleagues was still more outspoken. The Joint Resolution was entirely condemned. The opinion ends in this sentence: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling." Orally, the justice, in pronouncing the opinion, referred to Nero as to a precursor of

though not matured, 49 Stat. 938, 31 U.S.C. 773a. Only a dollar-for-dollar payment is authorized, *Machen v. United States*, 87 F.(2d) 594 at 597 (1937).

⁴⁹ Hart, *loc. cit.*, at 1084, 1095 and *passim*; Dickinson, *loc. cit.*, at 720 *et seq.*; Collier, *loc. cit.*, 536 *et seq.* We refrain from discussing the implications of the 4th section of the Fourteenth Amendment of the Constitution, secondarily referred to by the Supreme Court ("the validity of the public debt of the United States authorized by law . . . shall not be questioned"). See Eder, "A Forgotten Section of the Fourteenth Amendment", (1933) 19 *Corn. L.Q.* 1; Hart, *loc. cit.*, at 1068, n. 40; government brief in the *Perry* case (n. 532) 61, 67, 85.

⁵⁰ 294 U.S. 330 (1935) at 350.

⁵¹ Chief Justice Hughes, Justices Brandeis, Roberts, and Cardozo. With Mr. J. Stone, concurring, they constituted the majority.

Congress and exclaimed "The Constitution is gone". Some years later, in *Smyth v. United States*,⁵² Justices McReynolds, Sutherland, and Butler, in a dissenting opinion, even ventured to stigmatize the call by the government for accelerated payment of the Liberty bonds as "a dishonest effort to defeat the contract and to defraud the creditor" because the government intended to pay the nominal amount of these gold bonds; and they insinuate that those who see the situation differently do not "reverently fix their gaze on the Eighth Commandment". However, the reasoning of the minority justices was not as strong as their language.⁵³

As was pointed out, in judging the gold clause cases as well as the legal tender cases, one must not overlook the "hard-money" sentiment, so deeply rooted in American individualism. There are American writers who even subsequent to the *Gold Clause Cases* argued for the entire invalidity of the Joint Resolution, though essentially on grounds of historical sentiment rather than in terms of legal analysis.⁵⁴ However, giving full weight and respect to the hard-money tradition, the judgment in the *Perry* case must be regretted. It is true that the gold clause cases were decided in favor of the government, but the language and tone of the *Perry* case, more than other decisions of the same period, challenge the legislative and executive branches of the government. German judicial revaluation reveals clearly the danger inherent in the democratic form of government, that the judiciary may overstep its boundaries. In the *Perry* case the Supreme Court did not steer clear of this danger. Historically seen, the case was therefore another factor in the development of antagonism between the judicial and the administrative branches of the government.

III. Comparative Aspects

The issue of constitutionality has also appeared in some other countries.

⁵² *Smyth v. United States*, 302 U.S. 329 (1937), see *supra*, p. 366, n. 39.

⁵³ Dawson, *loc. cit.*, at 652, 666 n. 36, 667 n. 38; Hart, *loc. cit.*, at 1062, n. 17; Collier, *loc. cit.*, at 525, 526. See also *infra*, p. 382, n. 12.

⁵⁴ Eder and Zelkowich in the articles cited *supra*, p. 362, n. 25. One would even deny the government of the United States in face of a world monetary crisis, the right to make unredeemable notes legal tender, *supra*, p. 207, at n. 50.

The English Court of Appeal has held that the Canadian Federal legislature has power to regulate gold clauses, but the reasons given are only of local interest.⁵⁵

A judgment of the Supreme Court of the Republic of Colombia likewise affirming the constitutionality of gold clause abrogation,⁵⁶ is more in point. The Court referred to the sovereign power of the state over the currency and declared that gold clause agreements constituted discriminations between the components of that currency contrary to the policy laid down by the Legislature. This argument, which is tantamount to the opposition of the American courts to a "dual monetary system", is supported by the Court's emphasis on the "nominalistic principle". The Court, however, rather goes out of bounds in stating that determination of the media of payment is no component of contracts at all.

In the Free State of Danzig also it was held by the Superior Court (*Obergericht*) that the Danzig gold clause abrogation did not violate the Danzig constitution.⁵⁷ The Court denied that general legislative action such as the abrogating law constituted an "expropriation" prohibited by the constitution except for just compensation.

In Greece the problem of constitutionality was raised in the field of contracts in foreign currencies. A decree of July 21, 1914, provided that debts contracted in Turkish *livre-or* (a gold coin) and payable in Greece were to be discharged in Greek paper drachmes at the rate of 22 drachmes for one *livre-or* (apparently an under-par ratio). The Court of Appeal at Saloniki held that the decree did not constitute an unconstitutional deprivation of property⁵⁸ because the state⁵⁹ was entitled to regulate the rate of foreign exchange to protect

⁵⁵ *British and French Trust Co. v. New Brunswick Railway Co.*, [1937] 4 All E.R. 516, 538 (C.A., 1937), referring to the fact that under the British North American Act of 1867, sec. 92(10), the work of the defendant railway had been declared by an Act of the Canadian Parliament to be for the general advantage of Canada.

⁵⁶ Judgment of Feb. 25, 1937, 44 *Gaceta Judicial* 613.

⁵⁷ Judgment of Jan. 16, 1936, *Z.A.I.P.* 1936, 121 [passing on decrees of May 2 and July 3, 1935, regarding abrogation of gold clauses in mortgages].

⁵⁸ Judgment of 1922, no. 139, *J.D.Int.*, 1923, 1013. *Cf.* Court of Athens, Judgment of 1933, no. 438, *J.D.Int.*, 1934, 185, in which reestablishment of gold clauses by a Greek decree of July 10/August 5, 1931, was held not to violate sections 6 and 19 of the Greek Constitution. See Darestre, *Les Constitutions Modernes* (Paris, 1928) 625.

⁵⁹ The French translation reads "*le pays*".

debtors against excessive losses resulting from fluctuation in the value of gold. It would appear that the legislature ought not to have less power over domestic currency.

An international problem, very similar to the constitutional one, appeared in Egypt under the regime of the so-called "capitulations" which seriously restricted Egyptian sovereignty in favor of foreign powers, although monetary measures were left entirely to the discretion of the Egyptian Government. The question arose whether the Egyptian ordinance of 1914 abrogating the gold clauses was valid thereunder, and whether the decree of 1935 extending the decree of 1914 to contracts involving international payments was a further infringement upon the "capitulations".⁶⁰ Both decrees were upheld by the Mixed Appellate Court of Alexandria, which pointed out, among other things, that the later decree did not impair "vested rights" of foreign creditors inasmuch as "protection" of their "vested rights" does not require giving them a preferential position.⁶¹ Another decision of similar import was rendered by the Anglo-German Mixed Arbitral Tribunal. A British national, a widow, who before the war had been a creditor of a gold debt under German law, sued the German Government for damages on the ground that by the ordinance of September 28, 1914, it had abrogated gold clauses. The argument was that this ordinance was an "exceptional war measure", entitling the injured national of an Allied Power to compensation under Article 297e of the Treaty of Versailles.⁶² The Court dismissed the claim, holding that

⁶⁰ See Reiss, *Portée Internationale des Lois Interdisant la Clause-Or* (1936) 64, and regarding the decree of 1935, *supra*, p. 319, n. 22.

⁶¹ Judgments of Feb. 18, 1936, *D.P.* 1936 II 78, with annotation by Professor Mazeaud. The doctrine advanced is not convincing. The question is rather whether in the absence of a constitutional or other definite legal guarantee there exists a protection of vested rights, and if so, how to draw the boundary line between vested rights and the exercise of the powers of sovereignty. The conflicting decisions of the lower courts are collected by Reiss, *op. cit.* Validity of the Egyptian decree of 1914 was also recognized by the Court of Athens in a judgment rendered in 1935, *J.D.Int.* 1937, 607. Application of both decrees was denied, for reasons of *ordre public*, by the Appellate Court of Paris, April 3, 1936, *D.P.* 1936 II 78, 87.

⁶² This article reads as follows: "The nationals of allied and associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property rights or interest . . . in German territory as it existed on August 1, 1914, by the application . . . of the exceptional war measure or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto." These paragraphs of the Annex are meaningless for the question under consideration.

the ordinance was not an "exceptional war measure".⁶³ Finally it may be mentioned that in a number of cases foreign courts on grounds of public policy have acknowledged the reasonableness of the Joint Resolution and of similar enactments.⁶⁴

On the whole, the courts display a distinct tendency to acquiesce in legislative gold-clause abrogation. A feeling prevails that what happened was inevitable. Feavearyear in his history of the Pound Sterling,⁶⁵ to which we have repeatedly referred, says:

"*L'or va pis toujours*' says the old French proverb, and it might well be applied, not merely to gold, but to all kinds of money. There is probably some principle deep down in human nature, or in the system which man has constructed for satisfying his wants by producing goods for his market, which secures that those who take a mortgage upon the means of production in order to live in idleness upon the interest shall in the long run be deprived of a portion of the wealth which they lend. Perhaps, if we only knew, they protect themselves by charging a higher interest. At any rate there is no doubt that the world's history can afford no example of a monetary unit which has been allowed for any very long period to appreciate. The English penny, six of which in the time of the Conqueror would buy a bushel of wheat or ten gallons of ale, will now purchase but one fourth of a loaf or one gill of the smallest beer. The English pound, which Domesday Book recorded as the year's rental of a hundred acre holding, will now scarcely pay a week's rental of two furnished rooms in a suburban villa. Yet the case of most, if not all the other currencies is far worse . . ."

⁶³ Judgment of Dec. 10 and 18, 1924, 4 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 666. In fact, the Court argued that the German Government, by having neither discontinued nor stayed the decree as required with regard to exceptional war measures by art. 297e, had indicated its opinion that the decree was not an exceptional war measure; and the Court held further that it was not competent to interfere with the conduct of the German Government. This seems very strained since the court was to determine whether or not an exceptional war measure existed, regardless of any government's opinion. Anyway, the conduct of the German Government in this instance has not been disapproved of, directly or indirectly, either by the tribunal or by the allied governments.

⁶⁴ *Infra*, p. 392.

⁶⁵ *The Pound Sterling* (1931) 332.

Creditors imposing gold clauses upon their debtors seek to dam their rights against the trend of events. The dam ordinarily will stand a while. In the long run, however, or under extraordinary circumstances, the levelling force of economic change will prove stronger. The Old Testament ordains each seventh year to be a year of release of debts, and it exhorts the wealthy to lend to the needy regardless of the approach of the year of release.⁶⁶ To seek protection from the year of release would certainly not be within the spirit of the Scriptures. There is, perhaps, primeval wisdom in these precepts.

IV. *Limitations and Effects of Gold Clause Abrogation*

Though the details of laws abrogating gold clauses vary widely, one can generalize to some extent, as to their legal effects and the limitations of their applicability. First, it is not a criminal offense thereunder to undertake gold clauses, even where the law extends its provisions to future contracts, as does the Joint Resolution.⁶⁷ The gold clause agreement is void in such a case, but no further punishment is imposed.⁶⁸ Gold clause "gentlemen's agreements" may be concluded, and payments made thereunder or under an agreement avoided by statute are probably irrevocable if the payor knew that he was not legally bound to pay or had doubts thereon.⁶⁹

⁶⁶ Deuteronomy 15, 1; 15, 2; and 15, 9 ("Beware that there be not a thought in your wicked heart, saying the seventh year, the year of release is at hand.")

⁶⁷ It is surprisingly not an American, but the Polish Supreme Court, which has accurately so held, applying American law in the case of a gold dollar obligation. Judgment of Nov. 19, 1935, (1936) 3 *Zeitschrift für Osteuropäisches Recht* 412. The Canadian Act of 1937, too, annihilates future gold clauses.

⁶⁸ Paying gold involves a different set of facts.

⁶⁹ Under civil law the concept of *naturalis obligatio* would come into play; it prevents recovery of payments voluntarily made in fulfillment of an ethical or similar unenforceable duty. As to German law, see Enneccerus-Lehmann, *Recht der Schuldverhältnisse* (11th ed., 1930) 9. As to French law, cf. Civil Code 1235 and 2 Planiol, *Traité Élémentaire de Droit Civil* (11th ed., 1935) 296. The special question before us is dealt with in an article by Mazin, reported at length in *Recueil Civil et Notarial des Jurisclasseurs (Cahiers verts)* 1937, 176. Under the common law the doctrine of illegality would prevent recovery of the payments made. See 5 Williston, *Contracts* (rev. ed., 1936), sec. 1630. That payments in paper money of the gold value do not amount to a violation of the Joint Resolution, was explicitly pointed out by Lord Wright of the Court of Appeal in *International Trustee v. The King*, [1937] A.C. 500 at 518-521 (1936). Mr. Justice Stone, in the *Norman* case, spoke of

Reference to gold value may be made validly in a contract, even in spite of gold clause abrogation. Thus, a contractor in an entirely American construction contract may reserve the right to rescind the contract if the money contracted for should depreciate beyond a certain point. No right to "require payment in gold or in an amount of money measured thereby"—as presupposed by the Joint Resolution—would be created by such an agreement. As a matter of fact, an agreement of this type (though apparently not concerning a contractor) was held valid by a French Appellate Court in a case in which a gold clause would have been void under the well-known French judicial rule.⁷⁰ The case is worthy of particular note because of the extreme strictness of French courts in matters of currency protection.

Where, however, a real gold clause is present and is invalidated by the law, the question arises how this invalidation affects other parts of the contract. In the United States it is considered a matter of course that notwithstanding the elimination of the gold clause, the contract will operate to all intents and purposes as it did before, except that the debtor has to pay merely the nominal amount of the sum promised under the clause. This view obviously conforms to the Joint Resolution which explicitly provides that every obligation purporting to give the obligee a right to require payment in gold or in money measured thereby "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts".⁷¹ The gold clause consequently is simply stricken from the contract.⁷² This proposition seems natural wherever the

the "prohibition", by the Joint Resolution, to pay the increased number of depreciated dollars (294 U.S. 360), but this term, also found elsewhere, is inexact.

⁷⁰ Appellate Court of Douai, May 23, 1933, *Revue du Droit Bancaire*, 1934, 276. The promise by a mortgagor to increase the value of the mortgage "to its value in gold dollars measured by paper dollars" was properly held void in *Levy v. Asbestos, Ltd.*, 153 Misc. 125, 273 N.Y. Supp. 911 (1934), although no payment in gold or measured by the value of gold was stipulated.

⁷¹ The Joint Resolution further provides that the abrogation of the gold clauses shall not invalidate the other provisions of the laws which authorized Federal gold loans. The underlying conception of the ancillary significance of gold clauses may easily be transferred to merely contractual relationships.

⁷² *Security-First Nat. Bk. of Los Angeles v. Cuesta*, 15 Cal. App. Rep. (2d) 302, 59 P.(2d) 542 (1936). The court, in an able opinion, held good a sale made under public notice requiring payment in gold

purchasing power of money has not diminished appreciably. The general problem of revaluing depreciated debts is presented in the contrary case; the existence of a gold clause may possibly justify a preferential revaluation rate.⁷³ In the absence of revaluation it seems that to avoid undue hardships for the lessor or other creditor, leases and similar long-time contracts, entered into under gold clauses, should be discontinued upon abrogation of such clauses.⁷⁴

In no case can restriction of gold clauses, legislative or judicial, be avoided by waivers declared in advance by the debtors. We considered a waiver of this type, coupled with a pledge of honor, in the French case of *Do-Delattre v. Scouteten*.⁷⁵ More elaborate and strictly business-like formulas are employed in many of the bond loans floated after the War in the United States by foreign debtors.⁷⁶ There is no doubt that

coin, the notice having been issued shortly before the nationalization of gold, while the sale took place after nationalization. The court pointed out that the requirement of payment in gold coin could be met by payment in any legal tender under the Joint Resolution and that under the latter the gold clause was *ipso facto* extinguished at that time. Same: *Security First Nat. Bank of Los Angeles v. Bennett et al.*, 17 Cal. App. Rep. (2d) 641, 62 P.(2d) 798 (1936). *A fortiori* public sales, under deed of trust, notified and made in "lawful money" are valid although the deed contained a gold clause. *Durst v. Battson*, 9 Cal. (2d) 156, 69 P.(2d) 992 (1937); *Peterson v. Corporation of America*, 21 Cal. App. Rep. (2d) 527, 69 P.(2d) 904 (1937); *Prudential Insurance Co. of America v. Sly*, 7 Cal. (2d) 728, 62 P.(2d) 740 (1936). See also *Green v. Uniacke*, 46 F.(2d) 916 (C.C.A. 5th, 1931), *cert. den.* 283 U.S. 847 (1931), where it was said that a bond containing a gold clause issued by a drainage district board would be valid even where the gold clause was invalid because of lack of authority on the part of the board.

⁷³ This has been suggested by the *Reichsgericht*, March 1, 1924, *R.G.Z.* 107, 370; May 24, 1924, *ibid.* 108, 176; April 26, 1928, *ibid.* 121, 110. However, the routine character of the clause makes this proposition doubtful.

⁷⁴ In the case of the French *Cour de Cassation*, Nov. 27, 1933, *D.H.* 1933, 585, a long-term lease contained a gold clause. The lessor under the regime of *cours forcé* having acquiesced in receiving the nominal amount of francs, the court held that the invalidity of the lease was cured. On the decisions of lower courts see 7 Planiol-Ripert, *Traité Pratique de Droit Civil Français* (1931) n. 1176. By the *Tribunal de la Seine*, April 6, 1927, *D.H.* 1927, 296 a 40-year lease by the *Ritz Hotel* in Paris involving an annual rent of 270,000 gold francs and made in 1910, was invalidated because of its gold clause. The question is still more important and at the same time more involved where rent stipulations in terms of foreign currency are invalidated, *infra*, sec. 32 IV.

Under the Joint Resolution there can be no doubt that gold dollar leases continue as plain dollar leases after the abrogation of the gold clauses. *Atkinson v. Neisner*, 193 Minn. 175 at 187, 258 N.W. 151 (1935).

⁷⁵ *Supra*, p. 336, n. 10. A pledge of honor was also a feature in the *Ritz* case, cited in the preceding note.

⁷⁶ A number of pertinent clauses are collected in the *Bulletin of the Institute of International Finance*, New York, of Aug. 4, 1929, p. 19.

no court will recognize a waiver of the protection granted by the *lex fori*,⁷⁷ and where the protection waived originated in foreign law, applicability of the latter will also entail invalidity of the waiver.⁷⁸

Litigation on gold clauses stipulated in negotiable instruments is frequently complicated by the rule under which the holder of a bond or coupon must not deliver the bond or coupon to the issuer for its face amount lest the holder be estopped from bringing suit for the difference between that amount and the gold value. It seems highly questionable whether the holder can safeguard his right by a reservation made when receiving face amount. In civil law courts there is a trend to hold such reservations effective.⁷⁹ Where this course is not followed⁸⁰ the average bondholder, not being prepared to conduct a lawsuit against the issuer, is practically compelled to collect his coupons at their face amount regardless of the validity of his claims for the gold value.

The following clause has been taken from the 7 per cent 5-year Krupp Gold Dollar Notes: "The Company waives any option or election or right it has or may hereafter have under the law of Germany, or otherwise, to pay principal of and interest and/or premiums, if any, on its indebtedness arising out of this agreement or Notes and/or coupons, in any currency other than that of gold dollars of the United States of America of or equal to the standard of weight and fineness existing December 15, 1924, as specified herein, and as specified in the Notes and coupons, and consents that any judgment against the Company taken in the Courts of Germany or of any other country because of any default by the Company in the performance of its obligations or any other matter or thing arising from this Agreement and/or the Notes and/or coupons and/or Indenture may be expressed in terms of gold dollars of the United States of America."

⁷⁷ See the decision in *Do-Delattre v. Scouteten*, *supra*. A limited and interpretative significance was attributed to the waiver clause in *Goodman v. Deutsch-Atlantische Telegraphen Ges.*, 166 Misc. 509, 2 N.Y. Supp. (2d) 80 (1938) [not a gold clause case].

⁷⁸ *Reichsgericht*, May 28, 1936, *J.W.* 1936, 2058.

⁷⁹ Court of Amsterdam, Nov. 27, 1935, *Bull. I.J.I.* 34, 105, and other cases cited by Domke, "*Couponzahlung unter Rechtsvorbehalt des Gläubigers*", (1936) 33 *Schweizerische Juristenzeitung* 102. Under French law the court, on the motion of a bondholder, may appoint a receiver for the collection of principal and interest; collection by the receiver of the face amount will not foreclose further claims of the holder. Appellate Court of Paris, Feb. 22, 1938, *Recueil Civil et Notarial des Juris-Classeurs*, 1938, No. 642.

⁸⁰ It will probably not be followed in American law. In *Schwartzman v. Post*, 94 App. Div. 474, 84 N.Y. Supp. 922, 87 N.Y. Supp. 872 (1904), even an express agreement reserving the creditor's right was disregarded because of the transfer of the instrument. See also *Uniform Negotiable Instruments Law*, sec. 119(4) and (5).

SECTION 30

CONFLICT-OF-LAWS AND INTERNATIONAL LAW
ASPECTS OF GOLD CLAUSESI. *The Legal System Applicable*

The international ramifications of gold clause abrogation¹ are most important. This is due first, to the fact that gold clauses were employed even more in international financing than in domestic, and secondly, to the divergent attitude of the several countries in regard to gold clause abrogation. The controversies center primarily on the American Joint Resolution which became a matter of concern even in entirely European transactions as a result of the universal use of the "gold-dollar" device. A broad international and legal discussion has arisen from these developments, involving problems of extraordinary complexity and challenging deeply rooted principles of law and economics. In most cases, the writer believes, the higher courts have reached legally satisfactory dispositions of the suits in question, but have frequently used objectionable or obscure arguments.

We must first look for a basis in principle from which to conduct our examination.

¹ Literature on international aspects of gold clause abrogation: Bagge, "L'effet int. de la législation Américaine clause-or", (1937) 18 *Revue de Droit Int. et de Législation Comp.* 457 and 786; Behrend, *Die Wirkung der Aufhebung der Goldklauseln* (thesis, Berlin, 1936); Bresch, "Obbligazioni con clausola oro o clausola valuta estera", *Foro delle Venezie*, 1934, 796; Domke, *La Clause "Dollar or"* (2d ed., 1935); Domke, "L'influence des lois monétaires sur le droit int. privé", *Nouvelle Revue de Droit Int. Privé*, 1937, 3; Domke, "Die Amerikanische Goldklauselgesetzgebung", (1938) 13 *Annuario di Diritto Comparato e di Studi Legislativi* 209; Eckstein, *Geldschuld und Geldwert* (1932); Hamel, "L'application des lois monétaires annulant les clauses-or, et les principes des conflits des lois", *Nouvelle Revue de Droit Int. Privé*, 1937, 499; Leschallier de Lisle, *Les Notions de Paiement International et de Contrat International* (Thesis Rennes, 1936); Nussbaum, "Comparative and International Aspects of American Gold Clause Abrogation", (1934) 44 *Yale L.J.* 53; Sauser-Hall, "La clause-or dans les contrats publics et privés", *Académie de Droit International*, (1937) 60 *Recueil des Cours* 653.

Pertinent materials are periodically collected in *Bulletin de l'Institut Juridique International* and *Zeitschrift fuer Auslaendisches und Internationales Privatrecht*. Virtually only those materials favoring the maintenance of the gold clause—omitting the cases to the contrary—are put together in Plesch, *The Gold Clause* (2d ed., 1936), vols. I and II; Plesch, *Recueil d'Arrêts et de Consultations sur la Clause-Or* (1937).

Under the French doctrine, "international" contracts would escape gold clause abrogation based on national legislation; the gold creditor according to this doctrine would possess a supernatural (indeed, almost supernatural) right. We have seen that this conception is unacceptable and was finally abandoned by the French Government.

In case of litigation the determination of the legal system applicable is simply a problem of conflict-of-laws. Although such problems must be solved according to the *lex fori*, the approach is practically the same everywhere. Despite the objections of a number of writers, the Courts of the various countries tend to apply the law designated by the parties in their contract, or if there is no such stipulation, to imply the intention of the parties from the data and the surrounding circumstances of the contract. Roughly speaking, the Court will examine the various territorial contacts of the agreement in order to determine the area in which the most important contacts are situated; the law of that territory will be applied on the theory that such application conforms with the probable intention of the parties (or perhaps on an "objective" theory, regardless of such presumable intention). As to gold clauses, the procedure described leads in numerous cases to an unquestionable solution. Almost all the gold dollar bonds floated after the war, by foreign debtors, in the United States are uncontestedly subject to American law. Usually the bonds mentioned carry provisions of the following type: "This agreement shall be deemed to be a New York contract and all rights arising thereunder shall be interpreted and performance thereof shall be governed in accordance with the laws of the State of New York in the United States and enforced accordingly." Federal law, of course, is by natural implication included in the law of the State of New York.² Where the wording is not so sweeping or even where the bond contains no such clause, the result still will be the same. The bonds in question are drawn like regular American bonds; they are phrased in the English language; stated in terms of gold dollars payable in the United States; they provide for an American "fiscal agent"; they are designated to

² *Reichsgericht*, May 28, 1936, *J.W.* 1936, 2058; Appellate Court of The Hague, Jan. 14, 1935, *Nederlandsche Jurisprudentie* 1935, 119; Appellate Court of Brussels, Feb. 4, 1936, *Pastorie Beige*, 1936 II 52 at 54.

be listed on the New York Stock Exchange and to meet the requirements thereof, and so on. Leaving aside, for the moment, the special problems of governmental debts and of public policy (*ordre public*) of the forum, it can be said with practical certainty that every court, American or foreign, will apply American law to such loans.³ Attempts have sometimes been made to limit application of American law or other foreign law restricting gold clauses by confining it to the rules existing at the time of contracting, or at least by excluding rules subsequently enacted which could not possibly have been contemplated by the parties. Yet those theories have been rejected by the courts.⁴ In selecting a foreign legal system as the law of the contract, the parties subject the contract to a variable body of rules which necessarily develops independently of their desires or expectations. Though the parties are free in their choice of law, by selecting a system they agree to its future changes. It would be neither justifiable in principle, nor feasible in practice to seek to discriminate between rules that were, and rules that could not have been, in the contemplation of the parties.

Some situations, however, raise more serious doubts as to the controlling legal system, and this is particularly true where the debt is payable outside the territory in which important contacts of the obligation are localized. There is a widespread if not universal rule that doubts concerning the manner of performance under a contract are to be resolved by reference to the law of the place of performance; or, more specifically put with regard to pecuniary obligations, the medium of payment in which a contract to pay money is to be performed, depends on the law of the place of payment.⁵ "Manner of performance" of the obligation stands in contra-

³ This is indicated by the cases discussed under III of this section (public policy). American law was also applied by the Court of Copenhagen (Feb. 3, 1934) in *Søderberg v. Telephone Company of Copenhagen*, affirmed, without opinion, by the Supreme Court of Denmark on Dec. 14, 1934, *Z.A.I.P.* 1935, 280 [loan exclusively placed in the United States, principal and interest payable in dollars in New York, the Guaranty Trust Co. being "fiscal agent"]; and by the Courts of Torino and of Naples on the cases cited *infra*, p. 392, n. 57.

⁴ *Reichsgericht* and Brussels Court cited in n. 2; Appellate Courts of Düsseldorf, Sept. 26, 1934, *Die Deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts*, 1934, 300 and of Cologne, Sept. 13, 1935, *J.W.* 1936, 203 (loan of the City of Saarbrücken). *Contra*: a subsidiary argument used by the Supreme Court of the former Saar Territory, Dec. 21, 1934, *Z.A.I.P.* 1935, 275.

⁵ For particulars, see *infra*, sec. 34, n. 2.

distinction to the "substance" of the obligation; the substance not being subject to the law of the place of performance to the same extent as the "manner of performance". The question then arises: Does the gold clause bear upon the "manner of performance," i.e., does the gold clause only regulate the medium of payment as to which the law of the place of payment is controlling? The answer will depend upon the prevailing construction of the gold clause. The gold coin clause, as such, probably regulates only the medium of payment. The gold value clause, however, clearly bears upon the amount of the debt, therefore upon the substance of the debt, since certainly nothing in a debt is more "substantial" than the amount to be paid. Only under the "Tantalus" interpretation of the gold coin clause can the decision on the validity of a gold coin clause be based on the place-of-performance theory. This theory was involved in the famous case of the *Serbian and Brazilian loans*, decided in July, 1929 by the Permanent Court of International Justice.⁶ The bonds had been issued before the World War; they were payable in gold francs in Paris and in other currencies in several places outside of France. When the franc depreciated, the debtor governments paid the bondholders only the nominal amounts of the coupons. Apart from the fact not discussed here, that they contested the existence of gold clauses in certain of the bonds, they maintained that the gold clause was ineffective because of the *cours forcé* of the French francs. On a suit brought by the French Government, in the interest of French bondholders,⁷ against the debtor governments the Court held that the defendants had to pay the gold value of the francs promised. It pointed out that "the money in which the payment must or may be made *in France* depends on French law" (italics the writer's). Applying the French doctrine of "international contracts" the Court, consequently, held the gold clause valid. It was expressly stated that the "substance of the debt" was controlled by Serbian and Brazilian law, respectively. The defendants had not in terms alleged that gold clauses were invalidated by their domestic laws.⁸

⁶ Permanent Court of Int. Justice, Collection of Judgments, Series A, Nos. 20/21, Judgment No. 14; *J.D.Int.* 1929, 977.

⁷ On the jurisdictional aspects of the cases, see *infra*, p. 402.

⁸ See *infra*, p. 390, n. 44.

Neither the Court's statements of the defendants' legal theories, nor its brief account of its own theory, quoted above, is clear. The Court seems to apply a place-of-performance theory, in reliance on the fact that the bonds were payable in Paris and in the currency of that place of payment. No other explanation is consistent with the Court's statement as to the applicable law.⁹ Of course the place-of-payment theory is particularly inappropriate in a case where the Court rejects at length the Tantalus interpretation of the gold clause and gives judgment for the gold value.

There is still another objection to the opinion of the Permanent Court. The coupons of the Serbian bonds were worded as follows: "4-1/2% gold loan, 1906 . . . Coupon payable . . . in Belgrade, Paris, Brussels and Geneva, for 11.25 fr.; in Berlin, Vienna, Amsterdam at the rate of exchange at Paris." At the time of the issuance of the loans Serbia, France, Belgium, and Switzerland, adherents of the Latin Monetary Union, had adopted the "franc" as their monetary unit. They

⁹ Reiss, *op. cit. supra*, n. 1, at 120, has adopted this writer's interpretation of the court's decision. However, Sauser-Hall, *op. cit. ibid.*, at 753, though an adversary of the place-of-payment theory, rejects it. According to him, the defendant governments did not demand the annulment of the gold clause because of any provision of Serbian or Brazilian law requiring it; they merely claimed to be entitled to make payment in French paper francs. The Court, once it had concluded that the parties had contemplated gold francs as defined in the French law of 1803 had only to decide what should be the mode of payment. Since payment was demanded in France, the Court properly held that this was possible in paper francs on the basis of the gold value. This at least seems to be Professor Sauser-Hall's point of view, which unfortunately is difficult to grasp from his argument.

Professor Sauser-Hall thus apparently assumes that the issue was whether the defendants were to pay gold or paper. Yet the real issue was how much the defendants had to pay. It is true that the defendants had claimed the right to make payment in French paper francs, but this was to be understood in the light of the "franc-for-franc" conception. Where they had promised to pay 1,000 gold francs, they offered, in view of the *cours forcé* of the francs, 1,000 paper francs. It is perfectly obvious from the opinion and the pleadings that this was the view of the defendants. They might have derived that *cours forcé* defense from the French law or they might have considered it as self-evident and conclusive under any law (which would have been in accord with the French conception). Part of the Court's language suggests that the defendants had by their pleadings placed their defense on the ground of French law. But in that case why should the Court have advanced an independent line of reasoning and conclusion concerning the applicability of French law? And nowhere did the Court state that the validity of the gold clause resulted from Serbian or Brazilian law. Whatever the explanation, the present discussion is only concerned with the actual reasoning of the Court. Quite another question is whether the result reached by the Court may be justified on different grounds. See *infra*, p. 390.

were therefore, by the terms of the coupon, coordinated as "places of payment". The fact that payments demanded by the holder in Berlin, Vienna, Amsterdam (rather than in Belgrade, Brussels, and Geneva) were to be made according to the rate of exchange on Paris is not a sufficient reason for considering Paris as the place of payment rather than Brussels or Geneva and particularly Belgrade. The Court refrains from giving a reason for favoring Paris. Even if the place-of-payment theory be adopted it would be sound doctrine to limit it to a situation where there is a single place of payment. Where several coordinated places of payment situated in different countries are provided, the "contacts" thereby created neutralize each other.¹⁰

The decision of the Permanent Court has been cited, without much discernment, by many courts, partly as authority against the "Tantalus" interpretation,¹¹ partly for what the decision does not say.¹² For its conflict-of-laws doctrine it has been referred to by the *Reichsgericht* in the case of the Vienna loan of 1902. The Vienna bonds provided for the payment of: "500 crowns = 425 marks payable in Berlin = 525 francs payable in Paris, Brussels or Basle = 100 U. S. A. gold dollars payable in New York." By an Austrian statute of January 27, 1922, the city of Vienna was authorized to discharge the bonds by paying the bondholders the amount of Austrian currency as stated in the bonds, in Austrian crowns. The effect was to deprive the bondholders of their rights, as the Austrian crown had depreciated nearly to zero. A bondholder brought suit in Germany against the city of Vienna for payment, in Zurich, of the full amount of Swiss francs, as indi-

¹⁰ The primary consideration in this problem is the multiple currency clause. See *infra*, sec. 35, n. 11.

¹¹ Thus by the House of Lords in the *Feist* case, [1934] A.C. 161 at 173 (1933).

¹² The Mixed Court of Cairo, Feb. 16, 1933, *J.D.Int.* 1933, 438, at 445, believes that the Permanent Court has "rallied" to the theory of the French courts. Similarly, Court of Torino, July 7, 1934, *Foro Italiano*, 1934 I 1351. An accurate interpretation of the decision of the Permanent Court is presented by the Appellate Court of Brussels in the judgment cited *supra*, n. 2.

In the gold clause cases, Mr. Justice Reynolds, dissenting, 294 U.S. at 363, gives the impression that the judgment of the Permanent Court, in which Chief Justice Hughes had participated, is authority for the minority view, and contradictory to the majority opinion written by the Chief Justice. However, the Permanent Court in applying French law has implicitly recognized the invalidity of gold clauses in domestic relations such as existed in the gold clause cases.

cated in the bonds. He did not avail himself of the dollar gold-clause, but the situation was similar to a gold-clause case. The *Reichsgericht* held for the claimant.¹³ It followed the Permanent Court in that it admitted the substance of the debt to be subject to the domestic law of the issuer (Austria) while "performance", as chosen by the plaintiff, namely payment in Zurich, would be governed by Swiss law. Thus the Austrian law of 1922 was eliminated. However, the Court was not only mistaken in assuming that it was confronted with a question of "performance" rather than one involving the substance of the debt, it was also wrong in making the choice of law dependent on the place of payment the plaintiff should elect. The bondholder on that theory would be entitled arbitrarily to change the law applicable in subsequent payments, and before the first election the bond or coupon would be under no law, a homeless wanderer. This is bad law.¹⁴

Independently of this continental development, the English Court of Appeal has recently announced a similar theory in *British and French Trust Corporation Ltd. v. New Brunswick Ry. Co.*¹⁵ In 1884 the company had issued bonds in terms "£ . . . sterling gold coin of Great Britain of the present weight and fineness" and payable, at the option of the holder, in London or in New Brunswick. The court held that the bonds were governed by Canadian law, but discarded the Canadian gold clause abrogation of 1937 and upheld the gold clause under English law, which was the law of the place of

¹³ Judgment of Nov. 14, 1929, *R.G.Z.* 126, 196.

¹⁴ However, the theory objected to has also been used in the Canadian case of *Corporation des Obligations Municipales Limitée v. Ville de Montréal Nord*, 59 *Rapports Judiciaires Québec, Cour Sup.* 550 (Superior Ct., 1921), *infra*, p. 456, n. 36; by the Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497 at 500. Similarly, though less distinctively, *Reichsgericht*, Sept. 30, 1920, *R.G.Z.* 100, 79; *Lann v. United Steelworks*, 166 *Misc.* 465, 1 *N.Y. Supp.* (2d) 951. The theory of the *Reichsgericht* was referred to in *Pan-American Securities Corp. v. Friedrich Krupp A.G.*, 6 *N.Y. Supp.* (2d) 993 (1938), applying German law.

A correct theory, disregarding, in the determination of the legal system applicable, the existence of several coordinate places of payment or collection, was advanced by the *Reichsgericht*, April 27, 1895, *J.W.* 1895, 302, which was not cited in the later cases, and by the Swiss Federal Tribunal, April 17, 1916, *Amtliche Sammlung* 42 II 179; Sept. 26, 1933, *ibid.* 59 II 355, approvingly citing a publication of this writer; and Sept. 18, 1934, *ibid.* 60 II 294. The Appellate Court of Hamburg, May 16, 1929, *Hanseatische Rechts-und Gerichtszeitschrift*, 1930 B 743, inveighs against the conception of a transportable "place of performance."

¹⁵ [1937] 4 *All E.R.* 516 (C.A., 1937) *supra*, p. 370, n. 55.

payment. The Court did not discuss the fact that the bonds were also payable in New Brunswick, an omission puzzlingly similar to that of the Permanent Court. As to London-payment, the Court was bound to recognize, under the *Feist* case, that a gold value clause had to be read into the contract. The rule under which the "mode of performance" is determined by the *lex loci solutionis* was therefore unworkable. Instead the Court advanced the theory that the "measure" of performance is also governed by that law.¹⁶ But this vague term in reality means the amount of the debt which is governed by the "proper law of the contract", hence by Canadian law. Under the latter, each gold clause obligation "governed by the law of Canada" was abrogated, the statute explicitly referring to gold debts payable outside Canada and in non-Canadian currency. Quaere: how could the defendant, a Canadian railway having promised to pay pound sterling in London, be deemed to be outside the scope of unmistakable Canadian rule? The Court of Appeal did not pose the question nor did it even mention the extraterritorial scope of the Canadian act. Certainly the result reached may be justified on the grounds of English public policy, but the Court shunned this argument, perhaps with an eye to the International Trustee case where the English Government had successfully invoked the American Joint Resolution,¹⁷ and probably realizing that the public-policy argument would immediately bar compulsory execution of the judgment in Canada.¹⁸ Be that as it may, not much authority can be attributed to the judgment as it now stands, particu-

¹⁶ To this extent the Court relied primarily on the language, inaccurately summarized, rather than on the holding of *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122 (H. of L., 1933), *infra*, sec. 34, n. 4. *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (C.A., 1920), referred to likewise by the Court, was not in point. Freight, on an English contract, was payable in Barcelona. A supervening Spanish maximum-freight statute was held applicable because its non-observation would have been punishable. In the *New Brunswick* case there was, however, no prohibition to pay the gold amount. The confusing term "measure of performance" was also used, although with no injury to the result, in *Auckland Corp. v. Alliance Assurance Co., Ltd.*, [1937] A.C. 587 (Privy Council, 1937), *infra*, sec. 35, n. 39. In the *Feist* case, Lord Russell of Killowen accurately found in the gold clause a reference to the measure of the debtor's obligation, [1934] A.C. 161 at 172. (While this volume was in press, the judgment of the Court of Appeal was affirmed by the House of Lords through an astounding construction of the Canadian act, [1938] 4 All E.L.R. 747).

¹⁷ [1937] A.C. 500 (H. of L., 1937).

¹⁸ *Infra*, p. 396, n. 76. Perhaps the *New Brunswick Act of 1937*, *ibid.*, was likewise in the mind of the Court.

larly in its use of the place-of-performance theory. All the more so since shortly before the decision of the Court of Appeal the Privy Council, in *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Co., Ltd.*, had developed another and a sound theory.¹⁹ The Council, a New Zealand Board, having issued bonds payable in Melbourne, invoked in its favor a Victoria statute which reduced interest. Despite the Victoria pledge of payment the Council was held liable for full interest. The Court pointed out that the substantial contacts of the bonds were preponderantly situated in New Zealand. The law of New Zealand was held therefore to be determinative of the amount due. The parallel to the gold clause situation is obvious.

Even less sound than the place-of-payment rule is the theory that the validity of a gold clause depends on the law of the currency contracted for. In fact the parties' choice of currency creates only a secondary "contact" in the case of a gold clause since it is the latter which is designed to safeguard the contract against fluctuations in the currency chosen. Though politically and constitutionally gold clause abrogation may be primarily a monetary measure, the individual gold clause, considered from the viewpoint of conflict-of-laws doctrine, presents a different aspect. Indeed, it is now a well-settled rule that the validity of the clause does not depend on the "law of the currency".²⁰ The Swiss Federal Tribunal in

¹⁹ [1938] A.C. 224 (1937). We do not dwell on the strained attempts of the Court of Appeal in the *New Brunswick* case to reconcile its decision with the *Mt. Albert* case.

²⁰ The only exception seems to be the Austrian Supreme Court, judgment dated March 12, 1930, *Die Rechtsprechung*, 1930, 105. An Austrian property owner mortgaged his estate to a German life insurance company for a debt expressed in gold marks. The liability of the owner was clearly governed by Austrian law since in the case of a real estate mortgage the personal liability should be considered as governed by the same law as is the mortgage. Furthermore, the contract was made in Vienna. Still the court held the gold clause vitiated by the German ordinance of Sept. 28, 1914. This opinion, however, was auxiliary; the decision rests primarily on different grounds. The proper theory had been set forth by the same court on Feb. 12, 1929, *Die Rechtsprechung*, 1929, 105. An Austrian insurance company in 1906 made an insurance contract with an Austrian resident in terms of German gold marks payable in Vienna. After the war the company tried to avail itself of the German ordinance of 1914. The court held that the defense was not good, and that the debt was exclusively governed by Austrian law, the closest connections of the contract evidently leading to Austria. See also judgment of Oct. 9, 1930, *Die Rechtsprechung*, 1931, 11. As to the important opinion of the Great Senate (*Plenarsenat*) of the Court regarding the American parts of the League of Nations

terms rejected the law-of-currency theory.²¹ The Supreme Court of Denmark, at a time when gold clauses were held ineffective under English law,²² deemed valid the gold clause of a contract made between a Norwegian shipping company and a Danish stockyard for payment in Copenhagen of English pounds "in gold".²³ And obviously, application of the American Joint Resolution is out of the question in respect to "gold dollar" stipulations to be found in numerous German or entirely Austrian or other European contracts of a wholly national character.²⁴

In the writers' opinion, the law of the country within which the contract has its most important contacts, and which is therefore controlling as to the "substance" of the debt should also govern the decision as to the validity of gold clauses.²⁵ This theory underlies the *Mount Albert* case, where a statutory reduction of interest was involved, the cases which were above considered as unquestionable²⁶ as well as the majority of the cases regarding governmental loans, which will be discussed below.

Loan and the International Federal Loan, see *infra*, p. 389, n. 41. The Belgian Court of Cassation, judgment of February 24, 1938, *Bull. I.J.I.* 39, 105 at 107, has somewhat the aura of applying the law-of-currency theory, but in reality rests on a law of contract doctrine. The former theory has, however, been adopted by the Polish and Austrian retaliatory legislation, *infra*, p. 395, n. 71 and 72.

²¹ Swiss Federal Tribunal, Feb. 1, 1938, *Amtliche Sammlung*, 64 II 88 at 94, citing this writer.

²² Namely, in the interval between the Court of Appeal and the House of Lords decision in the *Feist* case, *supra*, p. 353, n. 99.

²³ Judgment of June 21, 1933, *Z.A.I.P.* 1933, 960.

²⁴ Thus explicitly *Reichsgericht*, Nov. 12, 1934, *J.W.*, 1935, 189; same date 34 *Bankarchiv* 163; *Reichsfinanzhof* (highest German taxation court), Jan. 21, 1937, 36 *Bankarchiv* 329, and with regard to gold dollar stipulations in entirely Hungarian contracts, Supreme Court of Hungary in several cases listed, without indication of dates, in *Z.A.I.P.* 1937, 685.

²⁵ More is said on this point in Nussbaum, *Deutsches Internationales Privatrecht* (1932) 236, 257. There still exists a theory, unfortunately adopted by the Restatement, *Conflict of Laws* (1934), sec. 332(d), according to which the requirements for making a contract binding are governed by the law of the place of contracting. In the case of gold bonds this would mean that the law of the place of issuance (rather than of the place of flotation) would be controlling as to the validity of the gold clause. This doctrine is unacceptable, see Nussbaum, *op. cit.*, and in (1934) 44 *Yale L.J.* 70, and is not in accord with most of the cases. The viewpoints taken by this writer have recently been approved by the Swiss Federal Tribunal in the judgment cited *supra*, n. 21.

²⁶ P. 379. See also *Kricorian v. Ottoman Bank*, 48 T.L.R. 247 (K.B., 1932) [account of a Turkish national with a Turkish bank; place of payment (probably Smyrna) not referred to; gold clause abrogation under Turkish law held applicable].

II. *Government Bonds*²⁷

Government bonds, which frequently contain gold clauses, present, from the point of view of conflict-of-laws, a special problem. Despite controversies among legal writers,²⁸ it is well settled that such bonds are governed by common law, or in continental terminology by "private law" rather than by international public law.²⁹ According to a traditional rule, however, a sovereign state (or a subdivision thereof) in dealing with private persons, is supposed to stand on its own law. It is admitted that a state may voluntarily submit to another law; but under the traditional rule this qualification has practically no significance. The traditional theory was used by the *Permanent Court* in the case of the Serbian and Brazilian loans and by the *Reichsgericht* in the case of the Vienna loan, although eventually in a roundabout way both courts applied a legal system other than that of the debtor state.

More recently, however, the traditional rule itself has been broken down by the gold clause controversies. The English case of *Rex v. International Trustee for the Protection of Bondholders A. G.* is of particular significance. In 1917 Great Britain, through the banking house of Morgan and Co., had floated a 5½ per cent loan of 250 million gold dollars in the United States. The bonds were registrable in New York and generally drafted in the American manner; payment was to be made, however, at the option of the holder, either in New York, in gold dollars, or in London, in pound sterling at the fixed rate of \$4.86½ to the pound. The King's Bench, in a suit brought for the gold dollar amount by the holder of a bond against the British Government tried to protect the government by a resolute use of the "Tantalus interpretation"

²⁷ See Domke, "*Des emprunts d'états libellés en dollars-or*", *J.D. Int.* 1936, 547; Schmitthoff, "The International Government Loan", (1937) 19 *J. of Comp. Legislation* 179; Note (1937) 46 *Yale L.J.* 891.

²⁸ Consult Edwin M. Borchard, "International Loans and International Law", (1932) 26 *American Society of Int. Law, Proceedings* 134, 143.

²⁹ See *Murray v. Charleston*, 96 U.S. 432 at 445 (1877), and further decisions quoted by King, "The Gold Clause: can it constitutionally be abrogated by legislation", (1934) 2 *Geo. Wash. L.R.* 131, 149; Feilchenfeld, *Public Debts and State Succession* (1931) 650; Sack, "The juridical nature of the public debts of States", (1932-33) 10 *N.Y.U.L.Q. Rev.* 127, 341.

although it felt that it ought to apply English law.³⁰ This the Court of Appeals was unable to permit. Deciding, under the traditional rule, for the application of the English law, it gave judgment for the plaintiffs,³¹ setting another example of judicial straightforwardness in a very tempting situation. The House of Lords unanimously³² reversed this decision. It held that the English Government had submitted to American law and was therefore entitled to rely on the Joint Resolution. The House of Lords reduced the traditional theory to a standard to be overcome by any counter-indications derived from the circumstances of the case. This relaxation of the strict traditional rule is certainly plausible, and there is no serious objection to the finding that despite the fact that the English Government was the issuer and despite the alternative of London payment, the main contacts of the bonds were American. Still, approval of the opinion is subject to considerable qualification. The loan was originally made through short-term "notes" to be exchanged at the option of the holder for the bonds at bar. The notes were secured by a large pledge of securities deposited by the English Government with the Bankers Trust Company in New York, on behalf of the note-holders. The pledge agreement provided for a "judicial" sale and contained certain additional clauses apparently relating to American law. It was upon these pledge-clauses that the House of Lords mainly relied for the application of American law. It is, to be sure, well-settled law, in England and elsewhere, that the rights of a pledgee are determined by the *lex rei sitae*.³³ This very rule was used by the House of Lords to read references to American law into the clauses of the pledge agreement. The law of the pledge is not, however, the law of the contract.³⁴ Nor would a pledge (or mortgage) defined in terms of gold even permit an inference as to the gold

³⁰ 52 T.L.R. 82 (1935).

³¹ [1937] A.C. 500 at 505 (1936).

³² [1937] A.C. 500 (1937).

³³ See, e.g., 2 Beale, *Conflict of Laws* (1935) 1008; Dicey-Keith, *Conflict of Laws* (5th ed., 1932) rule 152 and p. 608; *Inglis v. Robertson*, [1898] A.C. 616 (H. of L. [Scotland], 1898).

³⁴ In *British-South Africa Co. v. De Beers Cons. Mines, Ltd.*, [1910] 2 Ch. 502 (C.A., 1910), the Court of Appeal held that the equity of redemption in a South-African mortgage was governed by English law, the law of the contract, since it was an incident to the contract. The judgment was cited in the *Mount Albert* and in the *New Brunswick* cases but not in the *International Trustee* case.

character of the debt,³⁵ and in the case of the English loan, the Court's finding was based on mere routine clauses of a secondary nature. The most important circumstance is that the pledge was given to secure the notes. It did not secure the bonds, the holders of which were unable to learn from the text of the bond that there had formerly been a pledge. The law of negotiable instruments does not permit an interpretation vitally affecting the rights of the bondholders to be based on circumstances entirely outside the bond.³⁶ This is not a theoretical quarrel, since England is unlikely in the future to pledge tangibles abroad to secure a loan. The overemphasis laid on the pledge-clause³⁷ minimizes the significance of the case as a precedent. It enabled the House of Lords to avoid the disadvantages which would possibly have resulted in the future had they placed their decision on broader legal grounds.

American law, including the Joint Resolution, was applied by the Swedish Supreme Court to Sweden's American gold dollar loan of 1924,³⁸ by the Norwegian Supreme Court to Norway's American gold dollar loan,³⁹ by a Finnish Court to Finland's American gold dollar loan,⁴⁰ and by the Supreme Court of Austria (Great Senate)⁴¹ to the American parts of the Austrian "League of Nations Loan" and the "International Federal Loan" of 1930, all of which were likewise floated in the United States.⁴² In all these cases the United States (New York) was the exclusive place of payment, a place of issuance not being indicated on the bonds. The Swedish Court relied on the fact that the important contacts of the bonds were nearly all American, thus approving the

³⁵ See *supra*, p. 317, at n. 14.

³⁶ Brannan, *Negotiable Instruments* (6th ed., 1938) 270.

³⁷ It is significant that the eminent counsel of the British Government before the High Court and the Court of Appeal had not thought of the legal significance of the pledge clause. See the regretting remark by Lord Atkin, at p. 555. Counsel's theory was probably right.

³⁸ Judgment of Jan. 30, 1937, *Bull. I.I.I.* 36, 327 translated into English in 3 *Guld klausulmålet* (Stockholm, 1937) 130 at 147.

³⁹ Judgment of December 8, 1937, *Bull. I.I.I.* 38, 71; *Revue de Science et de Législation Financière*, 1937, 646, reversing City Court of Oslo, Nov. 17, 1936, *Bull. I.I.I.* 36, 85.

⁴⁰ City Court of Helsingfors, Dec. 23, 1937, *Bull. I.I.I.* 38, 280.

⁴¹ Great Senate (*Plenarsenat*): a special division (Senate) of the Court with a larger number of judges than an ordinary Senate.

⁴² Opinion of Nov. 26, 1935, *J.D.Int.* 1936, pp. 442 and 717.

view advanced by this writer.⁴³ The Norwegian Court followed the same line of reasoning. The Austrian Court, referring partly to particular Austrian conflict of laws provisions, based its opinion cumulatively on three grounds: that the currency chosen was American ("law-of-currency theory"); that the bonds, in fact, were issued in the United States ("place-of-contract" theory); and that the United States was the place of payment ("place-of-payment" theory). A sounder procedure would have been to base the opinion on the concurrence of those (and certain other) American contacts of the loan. The Austrian opinion is remarkable because it makes it clear that the several "*tranches*" of a financially undivided loan may have different legal settings. It was only the special contacts of the American "*tranche*" which made American law applicable.

In the case of the Serbian and Brazilian loans, there were neither findings nor inferable facts to show that the form of the bonds was exclusively French; the plurality of non-French places of payment points to the contrary. The theory advanced by the Permanent Court that the "substance of the debt" was controlled by Serbian or Brazilian law respectively, is therefore in point, and consequently those laws should have been applied to the gold clause. Since the debtor governments apparently did not plead that the clauses were invalid on the basis of their own law the outcome of the cases would have been the same, namely, to hold the debtor governments liable for the full gold value.⁴⁴

In some cases the validity of refusals by foreign governments to carry out their gold obligations have not been determined in judicial proceeding.⁴⁵ The rule under which a

⁴³ An opinion rendered by the present writer and submitted to the Swedish Court by the defendant Swedish National Debt Office, is published in 1 *Guld klausulmålet* (1935) 295.

⁴⁴ The Yugoslavian law of 1920, cited *supra*, p. 357, n. 4, was, for undisclosed reasons, not referred to by the Serbian Government.

⁴⁵ When the Polish Government refused to carry out the gold clause of the Polish Stabilization loan of 1927, it seems to have relied on the Polish law of 1934, Domke, "*Des emprunts d'états libellés en dollars*—*or*", *J.D.Int.* 1936, 547 at 553. This would suggest a defense built up on the "traditional" conflict-of-laws doctrine on government obligations. In Belgium a release by the Ministry of Finance (not a law) of April 30, 1933, ordered the holders of gold dollar bonds of the Belgian Government to turn in their bonds for stamping on or before May 4, 1933, purposely excluding, by the brevity of time, the American holders from the proceeding. Only stamped bonds were to be paid on a gold basis. See Scroggs, "Foreign Treatment of American Creditors", (1935) 14

foreign government enjoys extraterritoriality prevents bondholders from bringing suits in foreign courts, and suits in the courts of the defendant state are often precarious. "Exchange-control", which in so many states prevents actual payments even of debts acknowledged by the debtor or by the court, offers another impediment.

While the preceding discussion deals exclusively with public government bonds, other government gold obligations of a "private" (commercial) nature are subject to the same rules, but this question has engendered neither litigation, nor other legal discussion.

III. Public Policy ("*ordre public*")⁴⁶

Even if American law be applicable a foreign court may refuse to apply the Joint Resolution on the ground that it would be contrary to the "public policy" of the forum. The employment of the public policy, or *ordre public* doctrine is more frequent in civil law than in the common law courts.⁴⁷ In gold clause cases the test is whether the foreign rule in question is or is not strongly repugnant to the public policy of the forum. The underlying theory is semi-political in nature; it is designed to eliminate dangers that might result from a free application of foreign law under broad conflict-of-laws principles.

It would not be difficult for non-American courts to reject the application of the Joint Resolution on the ground of *ordre public*. Even the fact that the government of the forum has itself abrogated gold clause obligations would not present a legal obstacle to such refusal because *ordre public* envisages only the interests of the forum.⁴⁸ The Joint Reso-

Foreign Affairs 345. There is no information as to the legal basis of the Belgian measure. At any rate, its indirectness is highly objectionable and proved prejudicial to non-American holders also. See Swiss Federal Tribunal, September 16, 1937, *Amtliche Sammlung* 63 II 240, where the plaintiffs (Russian emigrants, it seems) claimed damages from their Swiss bankers for not having presented their Belgian gold dollar bonds in time for the purpose of stamping. This claim was dismissed on the broad ground that a depository banker is not under a duty to take care of the rights connected with the deposited securities.

⁴⁶ See Domke, "*La notion de l'ordre public en matière d'emprunts internationaux*" in (1937) 35 *Revue de Science et de Législation Financières* 217.

⁴⁷ See Nussbaum, in Cheatham, Dowling and Goodrich, *Cases and Materials on Conflict of Laws* (1936) 502.

⁴⁸ More will be said on this aspect of the *ordre public*, *infra*, sec. 38 II.

lution, however, was favorably, if not enthusiastically, received by foreign courts.⁴⁹ Foreign debtors were to profit on a large scale by the application of the Joint Resolution. In any case, the fact that the forum had adopted similar measures⁵⁰ prevented foreign courts from expressing censure of the Joint Resolution. In fact, the Joint Resolution has been applied by the House of Lords,⁵¹ the Austrian Supreme Court,⁵² the Supreme Court of Denmark,⁵³ the Supreme Court of Sweden,⁵⁴ the Supreme Court of Norway,⁵⁵ the Appellate Court of Brussels,⁵⁶ by Italian courts,⁵⁷ and by a Finnish court,⁵⁸ although, to be sure, in cases where domestic debtors were involved. The *Hooge Raad* (High Council), Supreme Court of the Netherlands did not go so far. In the much-discussed cases of the "Royal Dutch" [Shell] (*Koninklijke Nederlandsche Maatschappij tot Exploitatie van Petroleumbronnen in Nederlandsch-Indië*) and the Bataafsche Oil Companies (*Bataafsche Petroleum Maatschappij*) it tried to find a middle

⁴⁹ As to the judgment of the Court of Torino, July 7, 1934, *Foro Italiano*, 1934 I 1351, affirmed, for procedural reasons, by the Appellate Court of Torino, Dec. 27, 1935, *Foro Italiano*, 1936 I 229, regarding the American gold dollar loan of the *Società Idroelettrica Piemonte*, *infra*, p. 398, n. 83. The House of Lords in the *International Trustee* case did not even mention the possibility that applying the Joint Resolution might violate English public order. Under the circumstances the Court may have considered such a discussion as ridiculous. Such facts are illustrative of the unrealistic attitude of those writers who advance the theory that gold-clause acts, being *lois de police et de sûreté* (Code Civil, Art. 3), are strictly "territorial" and thus inapplicable abroad. This theory has been advocated particularly by French authors. See, e.g., Arminjon, "*Les lois politiques et le droit int. privé*", *Revue de Droit Int. Privé*, 1930, 385 and Reiss, *Portée Internationale des Lois Interdisant la Clause-Or* (1936) 105. See also the Antwerp judgment and Professor de Visscher's opinion cited *infra*, p. 395, n. 70.

⁵⁰ The courts of the countries in question are generally silent on this point. It is expressly made by the Dutch Supreme Court (*Hooge Raad*), Feb. 11, 1938, *Bull. I.I.I.* 38, 282 at 293 [see also Appellate Court of The Hague, Dec. 24, 1936, *Bull. I.I.I.* 36, 315 at 321], by the Court of Rotterdam, May 18, 1938, *Bull. I.I.I.* 39, 374 at 385 (applying the Canadian Gold Clause Act) and by the City Court of Helsingfors, Dec. 23, 1937, *Bull. I.I.I.* 38, 280.

⁵¹ In *The King v. International Trustee for the Protection of Bondholders*, [1937] A.C. 500.

⁵² Dec. 5, 1935, *Die Rechtsprechung*, 1936, 22, *J.D.Int.* 1937, 127, and the opinion of the Great Senate, *supra*, p. 389, n. 42.

⁵³ *Supra*, p. 379, n. 3.

⁵⁴ *Supra*, p. 389, n. 38.

⁵⁵ *Supra*, p. 389, n. 39.

⁵⁶ Feb. 4, 1936, *Pasicrisie Belge*, 1936 II 52, *Sirey*, 1937 IV 1 (regarding the American gold dollar loan of the City of Antwerp).

⁵⁷ Court of Torino, July 7, 1934, *supra*, n. 49; Court of Naples, Feb. 21, 1936, *Foro Italiano*, 1936 I 498.

⁵⁸ City Court of Helsingfors, *supra*, n. 50.

ground.⁵⁹ Both companies had issued gold dollar loans in the United States, using the customary form of American bonds. New York was named in both as the place of payment, but the bonds and coupons of the *Royal Dutch*, unlike the *Bataafsche*, were made "collectible"⁶⁰ at the New York dollar rate of exchange in Amsterdam and in certain other European cities. The *Hooge Raad* in the case of the *Bataafsche* held that the Joint Resolution did not violate Dutch *ordre public*, since the American Act "strives to adapt the social intercourse within the United States to the depreciation of the medium of payment"; this measure "has perhaps become inevitable through the considerable degree of depreciation in connection with the common use in that country of the gold clause in loan contracts". In the case of the *Royal Dutch*, however, the court, on the ground of Dutch *ordre public* set aside the Joint Resolution as destroying the right of the bondholders to collect, in Amsterdam, the exact amount of guilders promised in the bonds and coupons. Thus the bondholders of the *Royal Shell* were awarded full payment, the bondholders of the *Bataafsche* were not.⁶¹ The reasons for this judgment of Solomon are somewhat tenuous inasmuch as the collection in Amsterdam⁶² is not of much importance as compared with the more weighty American contacts that are identical in the two cases. However, the concept of *ordre public* gives the court much latitude and it cannot be said that the distinction made by it in these cases was arbitrary.

The *Reichsgericht* sought to temporize in dealing with the Joint Resolution in the case of the 1926 American gold-dollar loan of the *Deutscher Sparkassen-und Giroverband*.

⁵⁹ Judgments of March 13, 1936, *Nederlandsche Jurisprudentie*, 1936, 497 and 506; French translation in *Bull. I.I.L.* 34, 304 and 315 (1936). See Hijmans, *Allgemeene Problemen van Internationaal Privaatrecht* (1937) 221.

⁶⁰ On the distinction between "collectible" and "payable", see *infra*, sec. 35 I.

⁶¹ For identical reasons, the gold clause contained in the American dollar loan of the City of Rotterdam of 1924 was annihilated by the Appellate Court of The Hague, Dec. 24, 1936, *aff'd* by the Dutch Supreme Court, Feb. 11, 1938, *supra*, n. 50, where approval of the Joint Resolution is still more elaborate.

⁶² With an eye to it, the Court incidentally spoke of the "international character" of the loan, which did not exist in the case of the *Bataafsche*. This is no adoption of the French "international-contract" doctrine. The Court intended only to indicate that the *Royal Dutch* contract was not entirely American. Despite the presence of a Dutch place of collection, foreign gold clause abrogation was recognized by the Court of Rotterdam in the case cited *supra*, n. 50.

The Court by a judgment dated May 28, 1936,⁶³ for reasons of public policy held the Joint Resolution inapplicable to those bonds which at the time of the enactment of the Joint Resolution had been held by German residents. Foreign bondholders were thus discriminated against although these were bearer bonds, conferring upon every holder identical rights regardless of any personal qualifications.⁶⁴ The opinion, which repeatedly refers to national-socialistic legal thought and leadership was, however, immediately upset by the law of June 26, 1936,⁶⁵ which simply and plainly did away with the distinction advanced by the court, striking out, in harmony with the Joint Resolution and without exception, gold clauses contained in the bonds. In an official communiqué⁶⁶ reference was made to the technical and economic-political difficulties bound to result from the differentiation between foreign and domestic bondholders made by the *Reichsgericht*. The elaborate judgment, important for its prolific dicta, was even excluded from the official reports of the court.

Non-application of foreign gold clause abrogation has been justified by the Swiss Federal Tribunal⁶⁷ and by lower French courts on the ground of *ordre public*.⁶⁸ In some of the

⁶³ *J.W.* 1936, 2058.

⁶⁴ The discrimination problem reappears, with greater importance, in the multiple-currency situation, *infra*, sec. 35 I.

⁶⁵ *Supra*, p. 295, n. 58.

⁶⁶ *Deutsche Justiz*, 1936, 995.

⁶⁷ In the case cited *supra*, p. 386, n. 21, upholding the gold dollar clause of the loan of the German *Osrham Company* in the teeth of the German legislation of 1936.

⁶⁸ Appellate Court of Paris, Oct. 26, 1933, *J.D.Int.* 1934, 943, disregarding the Joint Resolution [in a case, however, where in fact no gold clause was present, *infra*, sec. 34, n. 21]; same Court, April 3, 1936, *D.P.* 1936 II 78 at 87 [disregarding the Egyptian decree of 1935]; *Tribunal Civil de la Seine*, Jan. 18, 1928, *J.D.Int.* 1928, 669 [disregarding Italian gold clause abrogation]; *cf.* Appellate Court of Paris, April 19, 1928, *J.D. Int.* 1928, 695 [disregarding a Polish ordinance of March 19, 1924, which reduced the obligations issued by Polish companies (in the instance; by the *Société des Charbonnages de Sosnowice*) and expressed in foreign currency, to one third in value].

A gold obligation contracted in 1918 between Russians in the Ukraine, contrary to Bolshevik law, was held valid by the *Tribunal Civil de la Seine*, Jan. 2, 1930, *Gazette du Palais*, 1930 I 488, on the ground that under the rule of the "white-guardist" General Denikin, old Russian Law not derogating the gold clauses applied. In the field of international private law there are probably few cases recognizing the jurisdiction of that general. The same Tribunal, July 23, 1936, *Sirey* 1938 II 25, concerned with the American gold dollar loan of the German *Siemens and Halske Company* brushed aside the Joint Resolution, pointing out among other reasons that the loan was an international contract because there was a flux and reflux of capital across the German frontier—a strange extension of the "international contract" doctrine. The decision was duly criticized in an annotation by Mestre.

French cases it is not clear whether inapplicability of the foreign rule is based on *ordre public* or on a narrow interpretation of the foreign law. A tendency sometimes appears to read into the Joint Resolution and similar acts such limitations as the court deems fit.⁶⁹ Thus the Civil Tribunal of Antwerp,⁷⁰ in a case involving the 1928 American gold dollar loan of the City of Antwerp proclaimed that the Joint Resolution described by the court as "the so-called Roosevelt Act (*sic!*) of May 29 and June 5, 1933" was "of strictly territorial application"; it is in fact quite clear that its benefits also extend to debtors abroad.

In Poland⁷¹ and Austria⁷² by recent enactments enforcement of gold clauses has been abrogated where this had already been done by the "law of the currency". This procedure is aimed especially but not exclusively at "gold-dollar" clauses. Hungary, too, has enacted a retaliatory law, which, however, adopts the test of the law of the creditors' domicile rather than the law of the currency.⁷³ The German laws of 1936 are retaliatory in their treatment of contracts whether having or lacking gold clauses, where the non-German currency in which they are couched has been devalued.⁷⁴

Contrariwise, if gold clauses are restricted in the forum a trend may develop because of "public policy", to extend those restrictions to any gold-clause agreement, regardless of

⁶⁹ See the Antwerp judgment cited in the following note.

⁷⁰ Judgment of Jan. 5, 1935, *Bull. I.I.I.* 32, 93, relying upon an opinion by Professor de Visscher, Louvain, [in Plesch, *The Gold Clause* (2nd ed., 1936) 110]. The judgment, however, was virtually reversed by the decision of the Appellate Court of Brussels, *cit. supra*, n. 56, in another case regarding the same loan and holding the Joint Resolution applicable.

⁷¹ Act of June 12, 1934 (sec. 4), *Dziennik Ustaw R.P.* 1934 No. 509. For an application of a "gold dollar" clause, see Polish Supreme Court, March 17, 1935, 4 *Zeitschrift für Osteuropäisches Recht* (New Series) 518.

⁷² Gold Clause Law of April 27, 1937 (*supra*, p. 357, n. 5) sec. 2. If the "law of the currency" has abrogated the gold clauses but partially, nevertheless all gold clauses attached to a sum couched in terms of that currency, are stricken out. Thus, despite the *Perry* case, Germany as the successor of Austria, is not bound, according to Austrian law, by the gold clauses contained in Austria's American dollar loans. The matter, however, is highly controversial. See Domke, "*Les efforts législatifs tendant à restreindre la validité de la clause-or*", *Revue Critique de Droit International*, 1938, 24, at 35 n. 1, giving references to Austrian writers.

⁷³ Act of Feb. 10, 1923; German translation in Nussbaum, *Vertraglicher Schutz* (1928), 92. This act leaned on an Austrian decree of June 14, 1921, *Bundesgesetzblatt*, 1921, No. 317, replaced by the 1937 law cited in preceding note.

⁷⁴ *Supra*, p. 295, n. 58.

the legal system generally applicable to the contract. In the case of *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*,⁷⁵ a gold clause litigation in which both plaintiff and defendant were foreigners, the New York Court of Appeals held that the Joint Resolution must be applied by an American court regardless of whether the debt would otherwise be governed by some foreign law. This ruling is objectionable. Application of the Joint Resolution is clearly not dependent on the nationality or residence of the parties, but this fact does not warrant the sweeping proposition of the court. In the case of a suit in an American court upon one of the numerous entirely European gold-dollar contracts calling for payment outside the United States there would appear to be no necessity to apply the Joint Resolution. An American interest in the situation involved should at least be required; in the *Compania de Inversiones* case it consisted in the fact that the bonds were payable and floated in the United States.

Wherever public policy requires annulment of gold clauses it may also prevent enforcement of foreign judgments recognizing such clauses.⁷⁶

⁷⁵ 269 N.Y. 22, 198 N.E. 671 (1935), *cert. denied* 297 U.S. 705 (1936); commented on in (1936) 45 *Yale L.J.* 723; (1936) 34 *Mich. L.R.* 726. *Contra*: 37 Op. Att. Gen. 250 (1933), where it is admitted that the Joint Resolution does not apply to debts governed by Belgian law.

⁷⁶ Enforcement of such judgments above the nominal amount of the debt is expressly prohibited by the Manitoba and New Brunswick Acts, *supra*, p. 358, n. 5, and by the Brazilian decree-law no. 236 of 1938, *Diario Oficial* of Feb. 5, 1938, see 1938 *Commerce Reports* (ed. by the U. S. Dept. of Commerce) 197. To be sure, non-application caused by misinterpretation of a gold clause act should not ordinarily prevent recognition of the foreign judgment. *Godard v. Gray*, L.R. 6 Q.B. 138 (1870); *McDonald v. Grand Trunk R. Co.*, 71 N.H. 448, 52 Atl. 982 (1902); *Restatement, Conflict of Laws* (1934), secs. 445, 451. But even apart from legislative interference one should not place too much reliance on the effectiveness of the latter rule. The Court of Oslo in a decision dated Dec. 12, 1934 (German translation in *Z.A.I.P.* 1936, 633), denied recognition to the judgment of the Supreme Court of Denmark, dated June 21, 1933 and cited *supra*, p. 386, n. 23. The Norwegian Court held that the express gold clause present in this case had not actually been contracted for, because its meaning was not perceived by the debtor, and it considered the contrary opinion of the Danish Court, which in all probability was accurate, at least within the bounds of reasonable interpretative doubts, as irreconcilable with the principles of good faith and therefore against Norwegian public policy.

IV. *Territorial Limitations Imposed by the Law Restricting the Gold Clauses*

The acts restricting gold clauses sometimes explicitly require, as a condition of their application, the presence of certain territorial contacts, ordinarily within their own jurisdiction. Thus the Polish law of 1934 and the Dutch law of 1937 contemplate in general only gold debts payable in Poland and Holland, respectively; the Swedish law relates only to bonds issued in Sweden.⁷⁷

The Joint Resolution, in terms, governs obligations payable in money of the United States. It does not, for example, cover gold obligations contracted in a Northern frontier district in Canadian dollars.⁷⁸ Canadian law, on the other hand, envisages "any gold clause obligation governed by the law of Canada", including therefore obligations in United States gold dollars or sterling gold which for any reason are governed by Canadian law. Apart from the limitation in respect to United States dollars the language of the Joint Resolution is very broad. Most important, it contains no qualifications as to the creditors and debtors affected. Congress has consciously extended the effects of the Joint Resolution to the gold obligations of non-American debtors as well as to gold obligations to non-American creditors. After the House and Senate committees had reported the Resolution favorably, Secretary of the Treasury William H. Woodin gave the following explanation of it:

"Internationally, adoption of the resolution might mean a reduction of more than \$2,500,000,000, in terms of foreign currencies, in debts owed to the American government and American business by foreign debtors. There would not be a commensurate loss to the American creditors unless they wished to use the repaid funds internationally.

"Treasury and Commerce Department figures show that this reduction would result because payments from abroad on private or governmental debts need no longer be made in gold. Dollars of any type, which

⁷⁷ References to the foreign statutes are given *supra*, p. 357.

⁷⁸ Still such contracts would possibly be affected by the prohibition to acquire and transport gold, *supra*, p. 71, n. 42. For the text of the Joint Resolution, see *supra*, p. 358, n. 6.

have been selling at a discount of at least 10 per cent in terms of foreign monies,⁷⁹ could be purchased and used to discharge the debt. Since the governmental debts owed America total more than \$11,000,000,000, and the long term investments of Americans abroad amount to more than \$15,000,000,000, the reduction in terms of foreign currencies as long as the dollar continues to sell at a discount of 10 per cent could aggregate about \$2,500,000,000."⁸⁰

In the House of Representatives the bill was even attacked as "framed in the interests of the foreign debtors of the United States".⁸¹ In fact, American and foreign courts have granted the benefits of the Joint Resolution to non-American debtors,⁸² and the Resolution, unique in so many other aspects, is exceptional also in that an Italian Court has held that its non-application would be contrary to the interest of the *Italian* national economy.⁸³

Of course, Americans owing gold-dollar debts to non-residents have likewise profited from the act, but their number may be regarded as negligible if the absence of judicial record is a criterion. The situation is the very reverse of the French one from which the doctrine of "international contracts" evolved. The action of the Congress is an example of fairness in international relations, the more unusual because the course taken by other states was generally discriminatory against foreigners.

Attempts have sometimes been made to read into the Joint Resolution the requirement of an American place of payment.⁸⁴ However, there is neither ground nor need for

⁷⁹ Namely, in the market of May, 1933.

⁸⁰ *U. S. News*, May 20-27, 1933, p. 3, col. 2. In the *Inversiones* case, *supra*, n. 75, the Court points to the fact that while Senator Carter Glass, in committee, moved to exempt foreign obligations from the act, this amendment was lost in committee. The remarks of Senator Fletcher referred to by the Court do not seem pertinent.

⁸¹ By Representative McFadden of Pennsylvania, (1933) 77 *Cong. Record* 4538. Similarly Rep. Beedy, *ibid.* at 4542.

⁸² *Supra*, p. 396. Regarding foreign courts, see *supra*, p. 392. The absence of space and time limitation in the Joint Resolution was particularly emphasized by the Supreme Court of Norway, Judgment of Dec. 8, 1937, *supra*, p. 389, n. 39.

⁸³ Court of Torino in the judgment cited *supra*, p. 392, n. 49.

⁸⁴ By a dictum of Judge Learned Hand in *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Co.*, 81 F.(2d) 11 (C.C.A. 2d, 1936). In that case, however, there was no gold clause at all, *infra*, sec. 35, n. 25. A similar attempt was made by the Dutch Court of first

such a differentiation. In the case of bonds particularly, the place of payment ordinarily is only one detail in a setting comprised of currency, language, fiscal agent, type of bond, etc., pointing to the same territory; hence application of the law of that territory, which is also the "place of payment", will certainly follow. By itself, however, the place of payment is not of great importance in the construction of pecuniary obligations. Suppose two Americans resident within the United States have for some reason stipulated for payment in American gold dollars in Canada. There would in such case hardly appear to be sufficient reason to take the case out of the rule of the Joint Resolution.

V. *International Law Aspects of Gold Clauses*

Gold clauses have sometimes been incorporated into international treaties such as the Treaties of Versailles⁸⁵ and St. Germain,⁸⁶ the financial provisions of which are articulated in terms of "gold marks", "gold crowns", "gold francs", and "gold lire". The Universal Postal Union fixes payments to be made by the members of the Union in terms of "gold-francs".⁸⁷ Obligations of this kind⁸⁸ cannot be reached by

resort in the case of the *Royal Dutch and Bataafsche* (*supra*, p. 392). Judgments of Feb. 15, 1934, *Weekblad van het Recht*, 1934, no. 12719. Again, in the *Compania de Inversiones* case, *supra*, p. 396, n. 75, reference is made to the American place of payment, but only to set forth the applicability of American law in the first place.

Regarding non-American gold clause abrogation the Court of Bucharest, June 12, 1920, *J.D.Int.* 1922, 196, declined application of the Roumanian gold-clause-restriction law to a "gold" bill of exchange payable in Athens, although the law did not provide for such an exception. The Court seems to have been impressed by the theory of the merely "territorial" effect of the gold clause law. At the same time the Court, perhaps on the ground of *ordre public*, disregarded the Greek law abrogating gold clauses. Thus the unfortunate drawee, excluded from the benefits both of Roumanian and Greek law, became a victim of legal theory. The accurate theory, with an eye to the Joint Resolution, was advanced by the *Reichsgericht*, May 28, 1936, *J.W.* 1936, 2058.

⁸⁵ Art. 262.

⁸⁶ Art. 214. See also Treaty of Neuilly, with Bulgaria, Art. 146, and Treaty of Trianon, with Hungary, Art. 197.

⁸⁷ Sec. 29, [1934] 174 League of Nations, *Treaty Series* 171. The gold franc has also been adopted, as an international measure of value, by the International Air Transport Convention of 1929, sec. 22, par. 4, 5 Hudson, *Int. Legislation* (1936) 100. Again, the Bank for International Settlement has set up a machinery for carrying out international postal payments in terms of gold francs. See the bank's *Seventh Annual Report* (1937) 103. The International Shipowners' Convention of 1924, sec.

unilateral measures of a national legislature. The true kernel of the French doctrine is here revealed. "Gold francs", "gold lire" in the context of the Treaties, are merely measures of the gold contents of coins existing at the time of covenanting and are not affected by later devaluations or debasements of the coin named. As far as it is known, the only international treaty the gold clause of which has become the subject-matter of controversy is the Hay-Bunau-Varilla Treaty of 1903 by which the United States acquired control of the Panama Canal Zone from Panama, for a payment of ten million dollars "in gold coin of the United States" in addition to an annuity, during the period of control, of \$250,000 "in like gold coin".⁸⁹ The absence from the treaty of the formula, customary in private contracts, of "the present weight and fineness" is just as immaterial as it was in the *Perry* case. The contemporary dollar, and not a later devaluated dollar, was contemplated by the Treaty. The treaty for the settlement of the controversy⁹⁰ has not yet been ratified.⁹¹

Governmental abrogation of gold clauses with injurious effects upon the interests of foreigners has given rise to international disputes.⁹² To one of these the United States was a party. The President of Guatemala, by a decree of December 22, 1903, abrogated the gold clauses;⁹³ gold claims on Guatemala, held mostly by American bankers, were thereby reduced to approximately one-sixth of their value.⁹⁴ As a

15, 2 Hudson, *ibid.* (1931) 1332, provides that the monetary units mentioned in the Convention (such as £) mean their gold value.

⁸⁹ Other examples would be awards in terms of gold, adjudicated by International courts, *infra*, sec. 36 II. A gold clause was also incorporated in the Agreement (*Protocol of Submission*) between the United States and Venezuela of 1903, art. 1(4), Wilson, *The Hague Arbitration Cases* (1915) 31.

⁹⁰ Art. XIV of the Treaty, 33 Stat. 2234.

⁹¹ *New York Times* of April 26, 1936, part I 35 1. This settlement takes as basis of payment the Panama monetary unit (*Balboa*).

⁹² It may be noted that the Constituent Charter of the Bank of International Settlements, being in the nature of an international contract, in sec. 2 expresses the capital stock of the bank in terms of Swiss gold francs, see *Command Papers* (1930) 3484, p. 111.

⁹³ No gold clause proper underlies the Act of Congress restoring to the Philippines the original gold value of the bank accounts held by the Philippine Government with American banks [for the regulation of the rate of exchange Philippines-New York], 48 Stat. 1115 (1934) (cited by Mr. Justice McReynolds, dissenting, in the *Perry* case, 294 U.S. 361 at 378). On the Philippine monetary system, see *supra*, p. 139, n. 19.

⁹⁴ See *Foreign Relations of the United States, 1904* (Wash., 1905), 346-351.

⁹⁵ See the letter of Messrs. G. Amsinck & Co. to Mr. Hay, American Secretary of State, *op. cit.*, preceding note, at 348.

result of remonstrance by the American and other governments, the President of Guatemala on September 14, 1904, repealed the decree.

More important is the German-Swiss post-war gold-mortgage controversy. Before the war, Swiss mortgage banks and insurance companies had made investments on a large scale in gold mortgages on German real estate and were therefore severely affected by the German ordinance of 1914 abrogating the gold clauses. The Swiss Government protested strongly against the ordinance as a violation of international law to the extent that the rights of foreign creditors were infringed. It won virtual recognition of its contention in 1920 by a treaty with Germany, in which the latter restored the gold clause in favor of Swiss mortgagees who in return agreed to extend the term of payment ten or fifteen years and to reduce interest.⁹⁵ It is noteworthy that a few years later the Swiss Federal Council rallied to the "Tantalus" interpretation⁹⁶ adopted by the *Reichsgericht* to do away with the pre-war gold clauses.⁹⁷ There can be no doubt that the non-discriminatory German ordinance of 1914 was a legitimate exercise of sovereign power over property situated in Germany. The compromise solution of the controversy was due partly to the extremely weak international position of Germany at the time, partly to mistakes on the part of the German negotiator.⁹⁸ The general interest of the controversy lies in the fact that maintenance of the gold clauses proved ultimately impossible. The Swiss creditors, despite the protective treaty and additional advantages conceded by the Ger-

⁹⁵ Treaty of Dec. 6 and 9, 1920, *R.G.Bl.* 1920, 2023. See Geiler-Pfefferle, *Das Schweizerische Goldhypothekenabkommen* (1924); K. Schroeder, *Die Deutsch-Schweizerischen Staatsverträge über Goldhypotheken* (1927); Schlegelberger, "Aufräumungsarbeiten auf dem Gebiet des Hypothekenrechts" (1931) 71 *Gruchots Beiträge* 449 at 459.

⁹⁶ Release of Jan. 15, 1924, 20 *Schweizerische Juristenzeitung* 309. See *supra*, p. 353, n. 92.

⁹⁷ *Supra*, p. 352.

⁹⁸ See Nussbaum, "Das Goldhypothekenabkommen mit der Schweiz", *Recht und Wirtschaft* 1921, 50. Apparently the German negotiator had believed in the Swiss thesis (later expounded by Jagmetti, [1925] 21 *Schweizerische Juristen-Zeitung* 179) that rights of non-German creditors are not subject to German legislation. See the semi-official German communiqué in *Berliner Tageblatt* of Jan. 4, 1921 (evening issue), and its refutation, *ibid.*, Jan. 7, 1921.

man Government,⁹⁹ were unable to obtain the gold amount, since the burden exceeded the capacity of German real-estate owners to pay. This outcome, which had been predicted, brings home the absurdity of forcibly upholding gold clauses in a crushingly devalued national economy.

Finally, the well-known case of the Serbian and Brazilian loans must again be mentioned in this context inasmuch as the French Government undertook to vindicate the rights of the French bondholders and, by agreement with the debtor governments, presented the controversy to the Permanent Court of International Justice for settlement. To be sure, the court felt that a controversy between the French Government, which had espoused the claims of its nationals, and the Serbian Government was a "dispute of an international character" as required by Article 14 of the Covenant of the League of Nations.¹⁰⁰ This view is disputable since it would enable each government arbitrarily to transform the private claims of its citizens into disputes of an international character.¹⁰¹ In fact, these are the only cases regarding gold clauses in international loans, passed on by an international tribunal. The Hague Convention of 1907 restricting the use of force in the collection of governmental contract debts and suggesting arbitration of controversies over such obligations has not led to arbitral proceedings. The so-called "optional clause", establishing among the Signatory Powers the compulsory jurisdiction of the Permanent Court of International Justice,¹⁰² would hardly offer a basis for forcing before that court a signatory debtor state which does not live up to a gold clause obligation. Under the optional clause the court has jurisdiction, apart from other grounds not in point, on "any question of international law", and on "the nature or extent of the reparation to be made for the breach of an international obligation", but payment of a government's

⁹⁹ Additional agreements between Germany and Switzerland were concluded in 1923 and 1934; *R.G.Bl.* 1923 II 284, and *ibid.* 1934 II 357. The 1923 agreement, reshaping the juridical basis of the treaty, followed the lines submitted by this writer, in advisory capacity, to the German-Swiss negotiating committee and published in *Berliner Tageblatt* (Financial Section) of Dec. 28, 1922.

¹⁰⁰ *J.D.Int.* 1929, 977.

¹⁰¹ See Schmitthoff, *supra*, p. 387, n. 27; Jacoby, "Some Aspects of the Jurisdiction of the Permanent Court of International Justice", (1936) 30 *Am. J. of Int. Law* 233 at 236.

¹⁰² See Fachiri, *Permanent Court of International Justice* (2d ed., 1932) 95 and 355, 360.

bond, without more cannot be considered a question of "international law", nor would nonpayment of such bond be a breach of an "international obligation".¹⁰³ Under the sounder theory those bearer bonds, placed with private investors through the channels of a stock exchange or in other fashion partake of the private nature of bonds in general. The course taken by the Permanent Court in the cases of the Serbian and Brazilian loan is not necessarily in conflict with this view since the term "dispute of an international character" is somewhat broader than a "dispute of international law" and since the governments agreed to submit the dispute to the Permanent Court for settlement, the court's assumption of jurisdiction was made easier.¹⁰⁴

SECTION 31

COMMODITY AND INDEX CLAUSES

I. *Commodity Clauses*

The gold clause is designed to safeguard the creditor against the risks inherent in the expression of obligations in terms of money. The gold clause falls short of being an adequate guarantee, however, because gold is subject to legislative vicissitudes which may defeat the aims of creditors. Gold, moreover, lacks the homely and familiar quality of commodities. Some or all of these considerations may have been behind the continued use in certain Southern States of tobacco-currency. They may also be the psychological explanation for the provision in a Virginia bond of 1782 wherein the obligor promised "to pay £1000 specie or such further sum" as should be "equal to the said £1000 in the year 1774, that is to say to purchase as much land and Negroes as it ought have done in ready money at the present time".¹ The most important, and the most frequently found "commodity clause", however, is the time-honored device, probably trace-

¹⁰³ *Contra*: Verzijl, "Goudclausule en Volkenrecht" in *Weekblad van het Recht*, 1933, no. 12654-6.

¹⁰⁴ It is not denied that an international compromise on arbitration may include bonds, for instance, by using a term as broad as "claims". See Ralston, *The Law and Procedure of International Tribunals* (rev. ed., 1926), n. 94 *et seq.*

¹ *Faulcon v. Harriess*, 2 Hen. & M. (Va.) 550 (1808).

able to the tithe, of fixing the compensation for the use of farm land in terms of grain or the value of the grain.² While French courts generally frown upon agreements tending to sever the compensation contracted for from the fate of the franc, leases fixing the rent in the aforesaid manner have been held good. The *Cour de Cassation* has pointed out, among other things, that grain prices are determined by various economic factors of which the rate of exchange is only one.³ Rents expressed in commodity values sometimes also occur in urban leases.⁴

The most extensive use of the market prices of individual commodities as a device for financing was tried in Germany during the inflation and the years following. Public utilities and industrial corporations then issued bonds for amounts to be determined by the market prices of certain commodities such as rye or coal.⁵ At the same time German emergency legislation permitted the prices of rye, wheat, potash and certain kinds of coal to be used as standards for fixing the amount of mortgage debts⁶ which, under the German public-

² Rents of this type are mentioned, e.g., in Y.B. 9 Edw. 4, 49 (Hil. Term, pl. 6, 1470) and *Anonymous*, 4 Leonard 46, 74 Eng. Rep. 720 (1590). Litigation turned on the question of the determinative date for the reckoning of damages in case the rent was not paid. The courts seem to have used the breach-day rule. In *Meason v. Philips*, Addison (Pa.) 346 (1797), an indirect grain rent was presented, the debtor having obligated himself to furnish four bushels of wheat for each shilling of rent. Similar rent clauses seem to have been frequent.

³ *Cour de Cassation*, Feb. 18, 1929, and March 18, 1929, *Sirey* 1930 I 1. The Court also relies on the French statutes of July 12, 1905, as amended Jan. 1, 1926, and June 9, 1927 [*D.P.* 1905 IV 71; *D.P.* 1926 IV 74; *D.P.* 1927 IV 309], regarding the jurisdiction of the *Juges de Paix* and referring to agricultural leases providing for a rent wholly or partly payable in grain. The decisions of the lower courts are collected by Hubert, *Sirey* 1930 I 1 at 4 (ann.), and *ibid.* 41 (ann.).

⁴ In French urban leases rents stipulated in terms of market price of bricks occasionally occur, *Cour de Cassation*, Dec. 22, 1930, *D.H.* 1931, 33.

A most peculiar commodity clause was passed on in an American case, *Lilley v. Fifty Associates*, 101 Mass. 432 (1869). A Boston lot was leased in 1817 for 1,000 years, the rent being stipulated in terms of "first quality of Russia Old Sables iron". Since 1840 payment had been made in money. In 1863 the lessor, upon tender of greenbacks, demanded delivery of such iron, which however had not been imported into the United States since 1856. Forfeiture of the lease was enjoined on the ground that the landlord had not given timely notice of his desire to receive iron.

⁵ Maus, *Anleiheformen unter dem Einfluss der Geldentwertung* (1925).

⁶ Decrees of June 29, 1923, and Oct. 5, 1923, *R.G.BI.* 1923 I 482 and 933.

recording system, must conform strictly to the forms provided by law. As a matter of fact, "rye mortgages" were given mostly by agricultural mortgagors, to special banking institutions which in turn procured the mortgage money by the issue of "rye mortgage bonds". Within a few years the whole system proved a failure because of the fluctuations in rye prices and the shortcomings resulting from the complicated and variable computations necessary for the determination of the payments due.⁷ Creation of "rye mortgages" and "rye bonds" then ceased.⁸ Subsisting rye mortgages were, by a long and difficult process, partly transformed through agreement of the parties into ordinary gold-mark mortgages, and finally converted into reichsmark mortgages by the national-socialist government.⁹

A particular shortcoming of these "stabilizing" devices as applied to mortgages is that where there is a "stabilized" first mortgage it is difficult to obtain a second mortgage. The reason is that the prospective second mortgagee is deterred by the uncertain monetary dimensions of the first mortgage from risking his own funds. The stabilized mortgage also renders the sale of the mortgaged property more difficult, since the would-be purchaser cannot accurately compute what his net income will be.

The litigation over rye bonds is illuminating. Obviously neither in rye clauses, nor in gold clauses, can the day of maturity be decisive for the computation of the sum to be paid. A date must be agreed upon prior to the maturity date in order that rye prices may be gathered in sufficient time before maturity to permit the necessary computations to be made. Moreover, in order to eliminate casual fluctuations the measure ought not to be the market price on a single day but rather the average price over a definite period. In a case decided by the *Reichsgericht*,¹⁰ a German agricultural mort-

⁷ See von Bissing, *Die Sachwertpfandbriefe und der Kapitalmarkt* (1928); "*Die Agrarkredite*" (1927), *Schriften des Instituts für Konjunkturforschung* (Sonderheft 3) 11.

⁸ This experience furnishes another argument against resting a monetary system upon the natural products of the soil rather than upon gold. After the breakdown of the German mark in 1923, Dr. Helfferich, famous expert on money and leader of the nationalist party, proposed to link the new "rentenmark" to the value of rye, main product of German agriculture, but adoption of this plan was averted. Schacht, *Stabilization of the Mark* (1926) 80.

⁹ Law of May 16, 1934, *R.G.Bl.* 1934 I 391.

¹⁰ Judgment of Nov. 13, 1924, *R.G.Z.* 109, 174.

gage bank had issued rye mortgage bonds with payments adjusted to the market price of rye; the interest due July 1 was dependent on the average price of rye from March 15 to April 14 and the interest due January 1 on the average price from October 15 to November 14. Inevitably protection to creditors will be diminished by a proceeding of this kind. The breakdown of the German mark in 1923 was so precipitous that, on the coupons due July 1, 1923, the creditors received a payment of one-eighth of the actual gold value of rye at that date, and on the coupons due January 1, 1924, one-thirteenth of the corresponding value. However, on regular mark bonds the bondholder would have received nothing. Of course the German events of 1923 are unique in world history. In cases of less violent inflations the losses will be considerably less though still palpable.

II. *Index Clauses*¹¹

Contracts not infrequently determine the amount of a pecuniary performance by an index clause referring to index numbers.¹² An interesting experiment was made in this connection by Professor Irving Fisher, one of the sponsors of the "tabular standard". In 1925 he caused the Rand Cardex Company of Buffalo to issue bonds promising the holder "such sum of money as shall possess the present purchasing power of one thousand dollars (\$1,000) with interest thereon at the rate of seven per cent per annum, payable quarterly on January 1, April 1, July 1 and October 1, in such sums as shall, at the respective times of payment, equal in purchasing power one and seventy-five one-hundredths per cent. (1.75%) of said purchasing power of one thousand dollars (\$1,000), all to be based upon an index number of the prices of commodities defined and fixed in accordance with the amplified statement below".¹³ "The index number employed was that for wholesale prices of the U. S. Bureau of Labor Statistics, and applied as of January 1, April 1, July 1, October 1,

¹¹ See Dawson and Coultrap, "Contracting by reference to price indices", (1935) 33 *Mich. L.R.* 695

¹² *Supra*, p. 20. A gold clause cannot be understood to refer to the general purchasing power of money. Court of Padova, Feb. 1, 1938, *Il Foro delle Venezie*, 1938, 304. But see *infra*, n. 23.

¹³ See *The Annalist*, Nov. 13, 1925, at 603.

the quarterly due dates, each such index number being a three months' average".¹⁴ Some years later the Rand Cardex Company having merged with another enterprise, the index bonds were replaced by ordinary bonds and by preferred stock.¹⁵ Since then the index bond has disappeared from the American bond market.

A particular shortcoming of the index bonds lies in the fact that they are not negotiable instruments since they do not provide for payment of a sum certain in money.¹⁶ A buyer of the bond, therefore, does not benefit by the protection granted by the law to a holder in due course of a negotiable instrument against claims of former holders and against hidden defenses of the makers. Such bonds, therefore, are unsuited to negotiation and are of reduced value even for investment purposes. It is not likely that this difficulty can be overcome by novel clauses providing for negotiability.¹⁷

More apposite would seem to be the use of index clauses in long-time urban leases though the average tenant is not apt to be attracted by an arrangement whereby his rent is

¹⁴ *Ibid.* at 604.

¹⁵ Irving Fisher, *Stable Money* (1934) 112. The same author at 388, remarks that "A few analogous types have been used by other commercial companies", but he does not give particulars. Nor are other instances mentioned elsewhere.

¹⁶ *Uniform Negotiable Instruments Law*, sec. 1, no. 2. See Nebolsine, "The Gold Clause in Private Contracts", (1933) 42 *Yale L.J.* 1051, 1093; Dawson and Coultrap, "Price Indices in Contracts", (1935) 33 *Mich. L.R.* 685.

¹⁷ *Contra*: Dawson and Coultrap, *loc. cit.*, giving full references to decisions and legal literature. The cases cited by the authors for their views hardly support their position. In *Morgan Brothers v. Dayton Coal and Iron Co.*, 134 Tenn. 228, 183 S.W. 1019 (1915), a debtor's waiver of equitable defenses against an innocent holder of the instrument was held good. However, whether the holder under such a waiver would be in the same position as to defenses raised by the debtor, as he would be under the Negotiable Instruments Law, is open to doubt. Similar is *Anglo-California Trust Co. v. Hall*, 61 Utah 223, 221 Pac. 991 (1922), where an even more limited waiver was involved. In *Gray v. Gardner*, 12 Dist. & Co. Rep. (Pa.) 449 (1929), decided by a lower court, the note sued upon "met all requirements of negotiability", only a certain "shadow of doubt" was eliminated, in the court's opinion, by the statement on the note that it should be held negotiable. Yet negotiability, because of its peril to innocent persons should be limited to definite and clear legal characteristics. The American majority view is against creation of negotiability by contract as can be seen in the citations of Professor Dawson and Mr. Coultrap. See also William R. White in A. A. Berle, *Cases and Materials in the Law of Corporation Finance* (1930) 742. Conforming to the American majority view is *Reichsgericht*, April 20, 1909, *E.G.Z.* 71, 30; Feb. 9, 1921, *ibid.* 101, 297. The latter case gives an elaborate argument, noteworthy from the viewpoint of American law.

automatically increased as soon as the general cost of living goes up. However, that objection does not apply to commercial leases.

There are a number of French cases dealing with urban lease contracts entered into on an index basis,¹⁸ and the use of such contracts is probably not confined to France.¹⁹ Index numbers in collective labor contracts and in awards fixing collective wages are frequently found in Australia.²⁰ In other countries those devices are less popular; there is a widespread impression that labor will hail increases in wages when index numbers rise, but will bemoan their reduction when index numbers fall.²¹ Again, during the German inflation and subsequently, property and liability insurance was sometimes issued on an index basis. This device, however, was soon abandoned as too cumbersome and because the insurance companies did not succeed in covering their risk by corresponding investments.²² One might expect to find index clauses chiefly in maintenance, pension and like contracts, yet judicial or other records thereof are almost entirely wanting.²³

¹⁸ Appellate Court of Paris, July 1, 1931, *Gazette du Palais* 1931 II 886; Appellate Court of Colmar, Feb. 26, 1932, *Revue Juridique d'Alsace et de Lorraine*, 1932, 524, and decisions of lower courts collected by Hubert, *Shrey* 1930 I 1, at 2.

¹⁹ Watts, "Inflation clauses in Mortgages and Loans", (1931) 4 *Australian L.J.* 315 at 318, quotes a lease clause based on the Quarterly Summary of Australian Statistics.

²⁰ They were first used as a factor, indicating the fluctuating purchasing power of money, in the determination, by award, of collective wages; approximately since 1922, their direct employ in collective labor contracts and awards has become frequent. The decisions of the "Commonwealth Court of Conciliation and Arbitration" became leading in this development. See "Commonwealth Arbitration Reports", *passim*; "Labour Reports" issued annually by the Commonwealth Bureau of Census and Statistics, Canberra [e.g., no. 27, p. 74]. Illustrative is *The Australian Workers Union v. The Commonwealth Railways Commissioners*, 49 C.L.R. 589 (High Court of Australia, 1933). The insertion of tolerance clauses seems to be common, see e.g., *The Association of Railway Professional Officers of Australia v. The Victorian Railways Commissioners*, 35 Commonwealth Arbitration Reports 392 at 393 sub. 5, and collective labor contract *ibid.* 863 sub. 1e.

²¹ See Fisher, *Stable Money* (1934) 388, referring to the American post war practice, by corporations, of fixing wages on an index basis. Dawson and Coultrap, *loc. cit.* 693, offer further references.

In Germany under the Republic, collective labor contracts not infrequently referred to the official German index of living cost. At present, the French Law on Conciliation and Arbitration Proceedings of March 4, 1938, sec. 10 (*Bulletin Législatif Dalloz*, 1938, 134) provides for an adjustment of wages, by awards, to the movement of index numbers, in case the movement exceeds five or in some situations, ten per cent.

²² See Manes, *Versicherungslexikon* (3rd ed., 1930) 1836.

²³ The Supreme Court of Czechoslovakia, June 11, 1937, *Prager Ar-*

The validity of index clauses is reasonably clear. They are in no way affected by the statutory prohibitions of gold clauses. Even if the spirit rather than the letter of the law be contemplated, gold clauses and index clauses cannot be assimilated to each other in view of the notable incongruities between index curves and curves of gold prices.²⁴ Moreover the benefits of index clauses are not nearly so one-sided as those of gold clauses, since their fluctuations are frequently of benefit to the debtor. Hence the French courts, despite their broad restrictive rule, after some initial hesitation by lower courts,²⁵ held the index clause good.²⁶ Doubts arise where the clause was framed for the exclusive benefit of the creditor. But even such a stipulation has been approved by a French Appellate Court.²⁷ In leases it would certainly seem necessary to limit the possible effects of a decline in index numbers by fixing a minimum rent in terms of currency, with an eye to mortgage interest and other fixed liabilities of the lessor.²⁸

Except for the difficulties of negotiability²⁹ it is probably not the law which has stood in the way of a freer use

chiv, 1937, 2088 construed a maintenance contract phrased in terms of United States dollars as referring to purchasing power. The case of the Court of Torino, May 22, 1934, *R.D. Comm.* 1935 II 532 at 569, although involving no maintenance contract may still be worth while mentioning. Plaintiff had obligated himself to supply the defendant with electric power, the rate to be computed by striking an average between the sterling price and the wholesale index figures elaborated by the Milan Chamber of Commerce.

²⁴ Cf., e.g., Bresciani-Turroni, *The Economics of Inflation* (1937) 443, 444 (Tables), giving for the period of the German inflation, wholesale-price and cost of living index numbers in terms of gold.

²⁵ See Hubert, *supra*, n. 18.

²⁶ See cases in n. 18 and Civil Tribunal of Strasbourg, June 14, 1933, *Revue Juridique d'Alsace et de Lorraine*, 1933, 535, upholding the index clause in a contract calling for a payment by long time instalments. The Appellate Court of Douai, judgment of Nov. 27, 1928, *Revue du Droit Bancaire*, 1930, 176, held invalid a lease clause based on the Paris living cost index pointing out that this index, being but approximately fixed, is too uncertain. Apparently no general importance can be attributed to the decision. Still it is a warning against resorting to an ill-defined standard in a desire to adapt the contract closely to local conditions. Of course index clauses cannot prevail over emergency legislation prescribing maximum rents. This has repeatedly been held by French courts. Decisions are listed in *Semaine Judiciaire*, 1938, 695.

²⁷ Appellate Court of Colmar, *supra*, n. 18.

²⁸ See Appellate Court of Paris, *supra*, n. 18, in the case of the *Société Biarritz-Cariton-Hôtel* which had rented certain rooms for 25,000 frs. annually under an index clause, the minimum rent, however, being 22,000 frs.

²⁹ And perhaps, some procedural disadvantages, such as inappli-

of index clauses. However, the labor of calculating by often complicated formulas³⁰ the amounts to be paid, and the odd results are a deterrent, especially where the index clause is used to calculate interest payments. A feeling of uncertainty concerning political influences in index number construction and concerning changes in the indexing methods may be another factor. Nor does the gold-clause experience make experiments with similar devices attractive to creditors. Moreover unfamiliarity with the use of index numbers in legal transactions certainly plays a part. In the writer's opinion a wider employment of index numbers of living cost in maintenance and pension contracts, and despite the special difficulty indicated above, in labor contracts, collective or individual, seems to be worthwhile considering; index numbers of various types may also be helpful in other special transactions. Careful selection of appropriate transactions is necessary to forestall the danger of future legislative infringements. Where under the contract the movement of index numbers merely creates a right to rescind, the legal objections are further diminished.³¹ Guarded "tolerance" clauses will be indispensable for making the clause workable.³²

cability of summary proceedings to claims for uncertain sums. See, as to German law, Nussbaum, *Vertraglicher Schutz gegen Schwankungen des Geldwerts* (1928) 33.

³⁰ See the form *supra*, n. 14.

³¹ *Supra*, p. 374.

³² *Supra*, p. 333.

CHAPTER VII

FOREIGN CURRENCY DEBTS

SECTION 32

FOREIGN CURRENCY DEBTS IN GENERAL

I. *The Foreign Currency Debt, a Monetary Obligation*

Debts expressed in terms of foreign currency, or briefly, foreign currency debts, are the necessary results of pecuniary transactions involving parties resident in different countries. Whatever the currency chosen, it will be foreign to at least one of those countries. This is true for any import or export bargain and, in the international field, for insurances, charter-parties, and other contracts of affreightment, loans, bills of exchange, etc. There is a strong tendency among contracting parties to select as the money of the contract the money of the economically most powerful country connected with the transaction. This explains why the problems of foreign-currency debts are, comparatively speaking, not so urgent in the United States and in Great Britain; although they are more and more felt in the whole of the British Empire. They are much more significant in the Continental and South American areas. In some European countries foreign currencies have also been employed on a large scale in domestic contracts in order to place the rights and duties under the contract on a more stable basis.

In law, the approach to foreign currency debts¹ is different from that used in dealing with foreign money as such.

¹ In German the term *Valutaschulden* is frequently employed to describe this kind of debts. For a general discussion see 3 Neumeyer, *Internationales Verwaltungsrecht* (1930), part 2, 284; W. Mayer, *Die*

As was seen,² foreign coins and notes are considered commodities outside their country of origin. American and English Courts have repeatedly concluded therefrom that non-American (or non-English) currency as the object of a debt is likewise a commodity, and have employed quite colorful language in describing the situation, comparing the payment of Dutch guilders to a delivery of Dutch bulbs³ or pointing out that "it is as if one should borrow his neighbor's cow".⁴ But it should not be questioned that if a guilder debt is payable in Holland the guilders are to be regarded as money by any court in the world.⁵ And even where the place of payment is outside the country of origin, the commodity theory fails.⁶ If an American sells goods for guilders to a Dutchman, a sale, and not a barter is involved, even though, under the contract, for one reason or another, the guilders are payable in New York. Due to the development of modern banking, the place of payment has only minor importance in this connection.⁷ Guilder accounts may be conducted in New York and elsewhere, for instance, by branch establishments or subsidiaries of Dutch banks. The monetary character of the

Valutaschuld (1934); Grube, *Pfund und Dollar* (1935), giving ample German references; Pasching, "Die Geltung fremden Währungsrechts", in *Oesterreichische Zeitschrift für Bankwesen*, 1937, 87.

² *Supra*, p. 113.

³ Merrill, J. dissenting, in *City Bank Farmers Trust Co. v. Bethlehem Steel*, 244 App. Div. 634 at 644; 280 N.Y. Supp. 494 at 505 (1935).

⁴ California District Court in *McAdoo v. Southern Pac. Co.*, 10 F. Supp. 953 at 955 (N.D. Cal., 1935) ("To put a homely illustration"). The comparison with a cow is also to be found in *S. S. Celia v. S. S. Volturmo*, [1921] 2 A.C. 544, 563 (H. of L., 1921). In *Gross v. Mendel*, 171 App. Div. 237, 157 N.Y. Supp. 357 (1916), aff'd 225 N.Y. 633, 121 N.E. 871 (1918), the Court in examining the conversion rate of exchange for marks payable in Germany, said that there was no reason why a different rule should be applied to contracts for the delivery of wheat, cotton, or other specific articles of merchandise. But the point was to ascertain the day controlling the conversion and the court utilizes the analogy of merchandise for that purpose only. Learned Hand, J., in *Anglo-Continental Treuhand, A. G. v. St. Louis S. W. Ry.*, 81 F.(2d) 11 (C.C.A. 2d, 1936) seems to have followed the same line of thought in saying of promises to pay foreign money in foreign countries—"its cost in dollars is still the measure, for foreign money is a commodity . . . lawful to buy, unlike gold". This language is not to be commended. See also Sutherland, J., dissenting, in *Deutsche Bank Filiale Nürnberg v. Humphrey*, 272 U.S. 517 (1926).

⁵ Accord: *Guaranty Trust Co. v. Henwood*, 98 F.(2d) 160 at 166 (C.C.A. 8th, 1938).

⁶ The place of payment is considered to be the decisive factor by Negus, "Rate of exchange in reference to foreign debts", (1924) 40 *Law Quarterly Rev.* 149; by Meyers, "Juridische vragen betreffende het geld", *Weekblad voor Privaatrecht, etc.*, 1924, 169, and probably by the Restatement, *Conflict of Laws* (1934), sec. 423 comment.

⁷ *Supra*, p. 228.

foreign currency debts is further brought home by the fact that universally, bills of exchange may be made out in a money other than that of the place of payment, and that the rules on interest, though with some qualifications,⁸ apply to obligations in foreign money. In harmony with this view, section 244 of the German Civil Code employs the phrase "monetary obligation couched in terms of a foreign currency".⁹

Such obligation must not be confused, as is frequently done,¹⁰ with an obligation purporting payment of a "particular kind of currency". This expression commonly refers to gold coin, or to silver coin, or to bank notes, or else to a special sort of currency of a given monetary system. A foreign currency debt may or may not call for payment in a "particular kind of currency"; for instance, an obligation calling for the payment of gold francs would be a foreign currency debt and at the same time would involve a "particular kind of currency". Whatever the nomenclature, the two concepts must be kept separate.

Another situation is presented where one agrees to buy in country A, money of country B for money of A. In such case the B money is dealt with as a commodity. The law of sales, including the customs of foreign-exchange trade, applies;¹¹ rules relating to debts do not apply to the seller's obligation.¹²

⁸ *Supra*, p. 236.

⁹ "... eine in fremder Währung ausgedrückte Geldschuld".

¹⁰ *Infra*, p. 418. The same confusion is found in *Forbes v. Murray*, Fed. Cas. No. 4928 (D.C. S.D. N.Y., 1869), and in the works of several foreign writers, such as 2 Bolaffio, *Codice di Commercio* (6th ed., 1937) 220, who relies on the opinion of Mancini. The *American Digest* lists foreign currency debts under the heading of "Payment: Particular Kinds of Money or Currency".

The question whether a foreign currency stipulation implies a tacit gold clause is different, *supra*, p. 317.

¹¹ In the foreign exchange business, if either dealer is in default, the other will ordinarily be under a duty to mitigate damages by purchase or sale, in the open market, as the circumstances may require. 2 Bolaffio, *Codice di Commercio* (6th ed., 1936) 214. A purchase, under such circumstances, by a German banker, of pounds sterling sold and not delivered by an English banker, was held proper in *re British American Continental Bank—Lisser and Rosencrantz's Claim*, [1923] 1 Ch. 276 (C.A., 1923). The same method may occasionally be used in the case of commercial foreign currency debts (Austrian Supreme Court, July 4, 1923, 6 *Die Rechtsprechung* 25), but there is no duty to use it. For the inapplicability of the law of sales to ordinary foreign currency debts, see Austrian Supreme Court, June 28, 1923, 5 *ibid.*, 320. See also *Sirie v. Godfrey*, 196 App. Div. 529, 188 N.Y. Supp. 52 (1921).

¹² In *Richard v. American Union Bank*, 253 N.Y. 186, 170 N.E. 532

II. *Applicability of the "Law of the Currency".* *"Cours forc  " of the Foreign Currency*

The fact that in a contract, payment is stipulated in terms of the currency of state A, does not subject the whole contract to the law of A.¹³ Selection by the parties of the A currency may be one factor among others in leading to the conclusion that the parties intended to adopt the law of A as the law of the contract, but the weight of this factor in the whole setting is slight. Stipulating for payment in terms of a foreign currency is, or has frequently been a minor point or even a matter of routine. In post-war times, the question has been given more thought by the parties. To the extent that they consider the question, however, they were and still are actuated chiefly by the desire to obtain a steady currency, hence by a monetary consideration, and this hardly warrants any conclusions as to the "proper law of the contract".

Consequently, "foreign currency" debts are ordinarily controlled by the "domestic" or "local" law rather than by the law of the currency. Nevertheless, the latter law does have a certain limited influence. If, for instance, American parties, in an American contract, provide for payment in English pounds, only English law can tell what the "pound" is and which types of coins and notes constitute the pound currency. Similarly, the parties must be governed by English legislative or administrative action affecting the value of the pound, unless the contract contains a gold or other protective

(1930) a New York bank had sold to the plaintiff, for dollars, two million Roumanian lei to be transferred to Bucharest. The lei were delivered after a delay, having meanwhile depreciated. The court made it clear that since the lei were sold as a commodity, the rule "lei for lei" was not in point; the seller was therefore obliged to pay damages. On the other hand, the purchaser in such a situation is not entitled to legal interest, Appellate Court of Hamburg, May 6, 1924, *Hanseatische Gerichtszeitung*, 1924, 147.

In exceptional cases domestic money may be purchased or sold, in the country of origin, with foreign money, *Reichsgericht* Jan. 3, 1925, *J.W.* 1925, 1986, annotated by the writer.

¹³ *The Liverpool and Great Western Steam Co. v. The Phenix Ins. Co.*, 129 U.S. 397 (1889); *Marine Insurance Co., Ltd. v. McLanahan*, 290 Fed. 685, (C.C.A. 4th, 1923); *Reichsgericht*, Nov. 24, 1931, *J.W.* 1932, 586; see, however, same court June 10, 1933, 9 *H  chststrichterliche Rechtsprechung*, No. 1935. In general, the courts, especially in England and America, pass on foreign currency debts without considering the applicability of the "law of the currency".

clause. In other words, the "pound-for-pound" rule, or, broadly speaking, the nominalistic rule, is also valid in the international field,¹⁴ regardless of the "proper law of the contract".¹⁵ The commonly used counter-argument was set forth, more than a century ago, by Pardessus,¹⁶ founder of the French science of commercial law. Referring to a case in which a Spaniard had promised a Frenchman 500 Spanish piasters, and depreciated piaster notes were subsequently made legal tender, Pardessus points out that the French creditor does not "owe allegiance" to the Spanish Government and is under no duty to "believe", because of the order of that government, that paper carrying the inscription "good for 500 piasters" is really worth that much. The answer is that the French creditor, who does not want to be affected by the fate of the Spanish piaster, should have contracted in terms of the French or another currency or else have secured himself by one of the protective clauses known for centuries. In Pardessus' example the piaster notes, being legal tender, represented valid piasters as owed by the debtor. The case would have been still more graphic if the claimed silver piasters had been withdrawn or seized by the Spanish Government leaving only paper piasters in circulation. But even in the absence of such a measure, the French creditor must receive paper piasters.

Of course where the foreign party is the debtor of the obligation, he will not complain of devaluation. In fact, as

¹⁴ The writings cited *supra*, sec. 24, n. 28. and sec. 30, n. 1, are also pertinent to this point, as are, particularly, the publications by Neumeyer, Melchior, Guisan, Eckstein, and Domke; see furthermore Lagarde, *Emission des Titres en France par des Sociétés de Commerce Etrangères*, Thesis Poitiers (1926) 155; Hubrecht, *Stabilization du Franc et Valorization des Créances* (1928); Penculesco, *La Monnaie de Paiement dans les Contrats Internationaux* (thesis, Paris, 1937) 224; and, though not very helpful, Sávatier, "L'influence de variations de valeur des monnaies, etc.," in *Revue Critique de Droit Int.*, 1937, 55. For the Anglo-American literature, see *infra*, p. 427, n. 20.

¹⁵ *In re Chesterman's Trusts*—*Mott v. Browning*, [1923] 2 Ch. 466 (C.A., 1923).

¹⁶ 5 *Cours de Droit Commercial* (3d ed., 1826) 271. Pardessus' views were adopted by other French writers and from one of them, by 2 Wharton, *A Treatise on the Conflict of Laws* (3d ed. by Parmele, 1905), No. 518. The seeds of Pardessus' view may be found in the ruling of Holt, Ch.J., dealing with a bill of exchange drawn on Oporto in Portuguese money. The latter having been devalued before maturity the maker was held liable for the original value of the Portuguese money. "The King of Portugal may not alter the property of a subject of England." *DuCosta v. Cole*, Skinn. 268, 90 Eng. Rep. 272 (K.B., 1689).

a result of the pound and dollar, and later on of the guilder and Swiss franc devaluations, the debtor countries have profited billions in their domestic unit.¹⁷

Today the triumph of the nominalist rule in regard to foreign currency may be called universal. It was recognized at an early date¹⁸ by the common law courts.¹⁹ Although these courts must convert foreign currency into the money of the forum, fluctuations of that currency between the time of contracting and the law day of conversion are not taken into consideration. The nominalistic theory has also been applied to foreign currency debts by high French,²⁰ Italian,²¹ Dutch,²² Austrian,²³ and other²⁴ civil law courts. German courts have

¹⁷ The profit enured to Germany through foreign (primarily pound and dollar) devaluation has been estimated by German writers as of the end of 1933 at four to five billion reichsmarks, Grube, *Pfund und Dollar* (1935) 1, n. 1. There are no statistics on the effects in Germany of the ensuing guilder and Swiss franc devaluations and of the German laws of 1936, *supra*, p. 295, n. 58.

¹⁸ A bill of exchange of 150,000 livres tournois drawn on Paris in 1792 was in *Searight v. Calbraith*, 4 Dall. 325 (Pa., 1796), allowed to be discharged by payment of assignats.

¹⁹ *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926) (marks); *Zimmerman v. Sutherland*, 274 U.S. 253 (1926) (Austrian crowns); *Dougherty v. Equitable Life Assurance Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934) (roubles); *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A.C. 438 (H. of L., 1921); *in re Chesterman's Trusts—Mott v. Browning*, [1923] 2 Ch. 466 (C.A., 1923) (marks); *Anderson v. Equitable Life Assurance Society of the United States*, 42 T.L.R. 302 (C.A., 1926) (marks); *Buerger v. New York Life Ass. Co.*, 43 T.L.R. 601 (C.A., 1927, Lord Scrutton concurring) (roubles); *Derwa v. Rio de Janeiro Tramway, Light & Power Co.*, [1928] 4 D.L.R. 542 (Sup. Ct. of Ontario, 1928) (francs); *Kricorian v. Ottoman Bank*, 48 T.L.R. 247 (K.B., 1932) (Turkish pounds).

²⁰ *Cour de Cassation*, March 10, 1925, *D.H.* 1925, 237; March 9, 1925, *J.D.Int.* 1926, 103; Jan. 11, 1926, *D.H.* 1926, 65; Feb. 25, 1929, *J.D.Int.* 1930, 1306 (roubles); April 12, 1927, *J.D.Int.* 1928, 414 (marks); April 4, 1938, *Sirey* 1938 I 183 (Indo-China piasters).

²¹ *Court of Cassation*, March 23, 1925, *R.D.Comm.* 1925 II 320. The obligation to deliver roubles was based upon a sale of roubles, but the rule would obviously have been the same in the case of an ordinary rouble debt.

²² *Hooge Raad*, Jan. 2, 1931, *Nederland'sche Jurisprudentie* 1931, 274 (German marks); Appellate Court of the Hague, June 8, 1931, *Nederland'sche Jurisprudentie*, 1931, 1499 (Belgian francs).

²³ Supreme Court of Austria, April 24, 1927, *J.W.* 1927, 1899 (German marks); March 12, 1930, *Die Rechtsprechung*, 1930, 105 (German marks); Sept. 11, 1929 *J.W.* 1929, 3519 (Polish marks).

²⁴ Supreme Court of Czechoslovakia, Jan. 19, 1934, and Dec. 6, 1934, *Z.A.I.P.* 1936, 172; Swiss Federal Tribunal April 5, 1895, *Amtliche Sammlung*, 21, 437 (Mexican dollars); July 1, 1926, *ibid.* 52 III 128 (French francs); Mixed Appellate Court of Alexandria, June 23, 1927, *Revue du Droit Bancaire*, 1928, 356 (roubles); Nov. 26, 1931, *J.D.Int.* 1932, 505 (French francs); Appellate Court of Brussels, Jan. 12, 1935, *Pasicrisie Belge*, 1935 II 90 (pounds sterling).

used it only in the case of "not ruined" currencies,²⁵ but even German "revaluation" or "readjustment" of "ruined" currencies²⁶ presupposes recognition of the depreciation process and its foreign legal basis. Occasionally application of the "law of the currency" has even been extended to gold clauses attached to foreign currency debts.²⁷ The right of a government to devalue its currency is also recognized in that injury done to foreign creditors by devaluation is not considered a good reason, in international law, for protest on the part of foreign governments, since a sovereign state's right to regulate its own monetary system is universally recognized.²⁸

The problems of valuation and taxation which arise in connection with foreign currency debts are identical with those resulting from the fluctuations in value of foreign money as such.²⁹

III. *Negotiability*³⁰ and *Recordability*

Since the bill of exchange has been, and to a certain extent still is, the principal instrument of international payments, it seems a matter of course that bills of exchange and other negotiable instruments should often be expressed in a currency other than the currency of the place of payment, without jeopardy to their negotiability. One might wish, for instance, to make a bill of exchange payable in Paris in pounds sterling, perhaps by drawing it on a subsidiary of an English bank. The validity of such bills is clearly implied in the civil law enactments regulating the manner of payment of bills expressed in a money or coin not current in the place of

²⁵ *Reichsgericht*, April 6, 1925, *J.W.* 1925, 1986, and Feb. 25, 1926, *ibid.* 1926, 1323 (French francs); June 28, 1934, *R.G.Z.* 145, 51 (English pounds); Appellate Court of Berlin (*Kammergericht*), Sept. 25, 1928, *J.W.* 1929, 446.

²⁶ *Supra*, pp. 291, 292.

²⁷ *Supra*, p. 385.

²⁸ The problem under consideration played a certain rôle in the American-German controversy over the German exchange control, *infra*, sec. 39, n. 9. Under the American-British Treaty of May 8, 1871, an Englishman, holder of American dollar bonds, sued the United States in the American and British Claims Commission for damages because of the dollar depreciation. The claim was disallowed ["Adams Case"] 3 J. B. Moore, *International Arbitrations* (1898) 3066.

²⁹ *Supra*, p. 125. On the German Law on depreciation profits of Dec. 23, 1936, *R.G.Bl.* 1936 I 1126, see *supra*, p. 295, n. 58.

³⁰ See the valuable article by Oliphant, "The theory of money in the law of commercial instruments", (1920) 29 *Yale L.J.* 606 at 619.

payment.³¹ The English *Bills of Exchange Act, 1882*, sec. 72(4) likewise speaks of a "sum payable . . . not expressed in the currency of the United Kingdom", but it too merely provides for the manner of payment of such sums. The Uniform Negotiable Instruments Law, which in section 6(5) confers negotiability upon instruments designating "a particular kind of current money in which payment is to be made" is distinctly obscure. It may be construed as referring only to gold coins or other particular kinds of national currency existing at the place of payment; for example, gold francs payable in Paris.³² It is doubtful whether non-national money can be "current" within the meaning of that provision. Moreover, the latter identifies the money in which the bill is expressed with the money in which the bill may be paid. Payment on a sterling debt may be made in dollars. The law therefore does not permit a definite conclusion as to whether, and to what extent, bills of exchange may be payable in a foreign currency. Nor do the American cases, most of which are New York cases, settle the law, although the weight of authority is in favor of allowing negotiable instruments payable in a money other than that of the place of payment.³³ Still, strange to say, in a world financial center such as New York, there is not complete legal certainty on this important point.

³¹ The pertinent laws of the various countries are listed and discussed in 1 Felix Meyer, *Das Weltwechselrecht* (1909) 288. Particularly important were French Commercial Code 143, German Bill of Exchange Act (*Wechselordnung*) of 1849, 37, Italian *Codice di Commercio* 39. As to the present "uniform" law, see *infra*, p. 419.

³² *Supra*, p. 413.

³³ Negotiability seems to be recognized by *Credito Italiano v. Rosenbaum*, 246 App. Div. 687, 284 N.Y. Supp. 177 (1935), *aff'd* 271 N.Y. 583, 3 N.E. (2d) 196 (1936), where the dissenting opinion of Untermyer, J., in the court below, shows that the issue of negotiability was adjudicated, Untermyer, J., himself holding the instrument not negotiable. Explicitly, in favor of negotiability, are *Hogue v. Williamson*, 85 Tex. 553, 22 S.W. 580 (1893), and *Incitti v. Ferrante*, 12 N.J. Misc. 840, 175 Atl. 908 (1933), the latter using an unfortunate argument, *supra*, p. 131, n. 28. In *Thompson v. Sloan*, 23 Wendell (N.Y.) 71 (1840), a note made out for \$2,500 in New York and payable in Buffalo, N. Y., "in Canada money", was held not negotiable by the Court. Since there was no Canadian dollar in 1840, the note called for a payment in Canadian money equivalent to \$2,500, hence for an uncertain "sum". For this reason, which was not given by the court, the note was not negotiable. The importance of the adjudication is therefore very limited. However, in a dictum the court points out that making a note payable in the United States in money of a foreign denomination is but another mode of expressing the (equivalent) amount in dol-

In 1933, the National Conference of Commissioners on Uniform State Laws proposed to amend the Negotiable Instruments Law by clearly distinguishing between foreign money and a particular medium of payment. As to the first, the commissioners suggested that the validity and negotiable character of an instrument shall not be affected by the fact that it "expresses the amount payable in terms of money authorized by a government, irrespective of where the instrument may be payable",³⁴ the designation by the instrument, of a "particular medium of payment" being neatly differentiated. The Geneva Uniform Law for Bills of Exchange and Promissory Notes (1930), adopted by the majority of the European countries, offers probably the best formula; it recognizes negotiability in cases where "a bill of exchange is drawn payable in a currency which is not that of the place of payment".³⁵ This provision, to be discussed later, has been extended to promissory notes.³⁶

While for all practical purposes it is safe to proceed on the assumption that the machinery of negotiable instruments can be used to secure a payment in foreign money, greater difficulties are encountered in recording foreign currency debts in public registers, particularly public mortgage or land registers. In highly developed systems of registration, it is sometimes the policy to permit recording only in terms of the national currency in order to make registrations more certain and uncomplicated.³⁷ Anglo-American law does not appear to have such restrictions.

lars and cents. This view, objectionable in itself, is misunderstood in *Chrysler v. Renois*, 43 N.Y. 209 (1870), to mean that a note payable in Canadian money is not a negotiable instrument in this country. But this is certainly not the theory of *Thompson v. Sloan*. *Hebblethwaite v. Flint*, 185 App. Div. 249, 173 N.Y. Supp. 81 (1918), frequently cited in this connection, is of only slight significance.

³⁴ *Handbook of the National Conference of Commissioners on Uniform State Laws* (1933), 43d Annual Conference (1933) 160. The reference made to the government seems objectionable, *supra*, p. 28. See furthermore *infra*, p. 427.

³⁵ Art. 41 of the Law.

³⁶ Art. 77 of the Law.

³⁷ Mortgages in terms of a foreign currency cannot be recorded under French law, Appellate Court of Paris, Feb. 21, 1925, *J.D.Int.* 1925, 745, No. 2, nor under Italian law, Scaduto, *I Debiti Pecuniari* (1924) 125, and they are utterly restricted in German law, Decree of March 12, 1931, *R.G.Bl.* 1931 I 31. Austrian law is contra, Austrian Supreme Court, Nov. 24, 1937, *Die Rechtsprechung*, 1938, 3.

IV. Restrictions Upon Promises to Pay Foreign Currency

The validity of promises couched in terms of a foreign currency may be questioned when inconvertible paper money of the forum has become legal tender. If *cours forcé* necessarily makes illegal any agreement aimed at escaping the effects of depreciation of the national money, contracts calling for payment of foreign money may be regarded as just as reprehensible as gold clauses. The French courts have in fact drawn this extreme conclusion³⁸ in the case of domestic contracts couched in terms of non-French currency. The conclusion is extreme because it constitutes a formidable menace to commerce, which deals on so large a scale with foreign currency. With remarkable ingenuity, however, the French courts have made their rule tolerable by expanding the doctrine of "international contracts". Transactions between French parties, though stipulated in terms of a foreign currency, have been upheld if legitimate from the viewpoint of French national economy. Thus the rule was laid down that c.i.f. contracts between French parties may validly be entered into on the basis of a foreign currency.³⁹ The same view is taken in the case of imported goods, such as grain, resold in France between Frenchmen as an incident of the import transaction.⁴⁰ A French exporter having sold goods abroad for the account of a French customer (as the "*commissionnaire*" of the latter) for foreign currency may settle the transaction with the customer in terms of such currency.⁴¹ Thus the courts appear to have succeeded in imposing reasonable limits on their doctrine. Still, to the extent that the foreign currency stipulation is held invalid, the consequences in respect to the contract as a whole present a difficult problem. While the gold-clause is ancillary to the sum contracted

³⁸ The leading cases are cited *supra*, p. 339, n. 27. The rule was extended to "garanties de change", *supra*, p. 339, n. 28.

³⁹ Appellate Court of Paris, May 12, 1928, and of Orléans, June 27, 1928, *J.D.Int.* 1929, 111; Tribunal of Commerce of Marseille, Jan. 12, 1928, *J.D.Int.* 1929, 682.

⁴⁰ *Cour de Cassation*, June 29, 1931, *J.D.Int.* 1932, 725; April 18, 1931, *Sirey* 1933 I 297; May 10, 1933, *J.D.Int.* 1935, 388; July 2, 1935, 13 *Droit Maritime Français*, 385; Nov. 20, 1935, *Gazette du Palais*, 1936 I 263; Appellate Court of Aix, Jan. 14, 1932, *Revue du Droit Bancaire*, 1932, 260. The cases refer to transactions made in "strings" ("*filières*"), i.e., transferable certificates.

⁴¹ *Cour de Cassation*, July 8, 1931, *J.D.Int.* 1932, 721.

for, the foreign-currency stipulation is an integral part of the contract. A gold clause, if invalidated, may simply be stricken out and will still leave a self-sustaining contractual text; the stipulation for payment in foreign-currency, however, cannot be eliminated in this way from the contract. If, despite the invalidity of this stipulation, the court would uphold the contract as such (in the case of a long-term lease,⁴² for instance), it can only be done by substituting a sum of domestic money equalling the amount of foreign money agreed upon.⁴³ This results in a judicial reshaping of the contract, hardly to be justified on the ground of legislation which merely makes irredeemable notes legal tender.

Although the vigor and consistency, or perhaps persistency of the French courts in defending their national currency is certainly impressive, the courts have overstepped their bounds. While judicial invalidation of gold clauses, under a regime of *cours forcé* has repeatedly been undertaken in the legal history of western civilization, there is, outside France, hardly an instance of judicial invalidation of foreign-currency debts.⁴⁴ Legislative abolition of protective clauses has also been confined chiefly to gold clauses, and this is particularly true of the American and Canadian⁴⁵ enactments. Those acts would probably be inapplicable even where the parties contracted in terms of a foreign currency to escape dangers threatening their national currency, since such a stipulation, substituting one monetary risk for another, differs widely from a gold clause.⁴⁶ There have at times been statutory prohibitions against contracting in foreign money. The

⁴² The *Cour de Cassation*, May 17, 1927, *J.D.Int.* 1928, 419, seems to assume that the lease at bar, couched in pounds sterling, was to be maintained despite the fact that the monetary stipulation was held invalid.

⁴³ This was done by the *Tribunal de Commerce de la Seine*, Dec. 17, 1926, *Revue du Droit Bancaire*, 1927, 500. The court took as a basis the rate of exchange at the time of contracting.

⁴⁴ The Belgian courts particularly have upheld foreign-currency stipulations, *supra*, p. 350, n. 81. The Supreme Court of Czechoslovakia has done the same, Nov. 27, 1936, *Prager Archiv*, 1937, 1065, this judgment having been rendered in the short time during which gold clauses were invalidated by that court. *Supra*, p. 349, n. 74. Perhaps the course of the Roumanian courts may be an example to the contrary, *ibid.*, n. 76.

⁴⁵ *Supra*, p. 358, n. 5 and 6. Instances to the contrary are the enactments by Colombia, Costa Rica, Cuba, and Mexico, cited *ibid.*, and p. 358, n. 5.

⁴⁶ Multiple-currency clauses, however, present a special problem, *infra*, p. 453.

first instances are found in medieval Italian city statutes.⁴⁷ The modern prohibitions are ordinarily concomitants of general exchange control.⁴⁸

Prohibitions of the type described are sometimes set up as a defense, or as a cause of action in foreign courts. The conflict of laws questions arising in such situations are the same as those generally involved in exchange-control legislation,⁴⁹ although prohibitions against foreign-currency stipulations are sometimes found without general exchange-control.

SECTION 33

OPERATION OF FOREIGN CURRENCY DEBTS

I. "Money of Contract" and "Money of Payment"

Where a debt is contracted in a money other than that of the place of payment, the law of that place will frequently provide that at the option of the debtor a payment in local currency equivalent to the sum contracted for may be made in the absence of an express stipulation to the contrary. This "local-payment" rule merely gives a privilege to the debtor, and does not entitle the creditor to demand payment in local money.¹ Since, however, the debtor will ordinarily avail himself of the privilege, the result is a diminution, desirable in the public interest, of the demand for foreign money.

⁴⁷ See Ascarelli, "*I debiti di moneta estera*" in *R.D. Comm.* 1923 I 445, n. 2. More recent examples in 3 Neumeyer, *Internationales Verwaltungsrecht*, (1930) part 2, 181.

⁴⁸ *Infra*, sec. 37 I. In some countries however, life insurance companies ordinarily are prevented from selling policies in foreign currency, the currency risk being held incompatible with the function of a life insurance company. See Wahle, *Der Einfluss Dictierter Umrechnungskurse auf Laufende Lebensversicherungsverträge in Fremdwährung* (1932) 17. In Germany life insurance policies in foreign currency have been converted into reichsmark policies by the [emergency] law of Aug. 26, 1938, *R.G.Bl.* 1938 I 1062, and decree of Sept. 10, 1938, *R.G.Bl.* 1938 I 1163.

⁴⁹ *Infra*, sec. 38.

¹ Italian Court of Cassation, June 9, 1923, *Foro Italiano*, 1923 I 796; Swiss Federal Tribunal, June 27, 1918, *Amtliche Sammlung* 44 II 213. This is an old doctrine. Ludovico Scaccia in *De Commercis et Cambiis* (1619), points out that payment in local currency is *in solutione* rather than *in obligatione* (sec. 2, gl. 5, no. 185, 188).

The "local-payment" rule first developed in the continental bill-of-exchange law² and was carried over to continental commercial law³ and partly into the general law of contracts;⁴ it has been formulated with particular care recently in the 1930 Geneva Uniform Laws on Bills of Exchange and on Checks.⁵ It appears also in the English *Bills of Exchange Act, 1882*, sec. 72(4), and although it is not supported by authority in the United States, it is probably in accord with American business custom in the field of negotiable instruments.⁶ Where the contract is intended to deprive the debtor of this privilege, the phrase customarily used is that "effective" payment shall be made in the foreign currency,⁷ but such a provision may be rendered inoperative by exchange-control in force at the place of payment. Generally speaking, in a conflict-of-laws situation, the law and custom of the place of payment will determine whether or not the debtor is entitled to make payment in the local currency, since merely a question of "manner of payment" is involved therein.⁸

Supposing the "local-payment" rule to prevail in the forum, the next question is whether the rate of conversion from foreign into local currency should be determined as of the date of maturity or of actual payment. Both theories have followers. In examining this problem, it must be borne

² Data on the history of the rule are given by Goldschmidt, *Handbuch des Handelsrechts* (1868) 1153 n. 35 and by Ascarelli, *La Moneta* (1928) 24; same, *I debiti di moneta estera e l'art. 39 Cod. di comm.* in *R.D.Comm.* 1923 I 447. The legal systems which had adopted the rule are listed by 1 Felix Meyer, *Weltwechselrecht* (1909) 290, and 4 Vivante, *Trattato di Diritto Commerciale* (5th ed., 1935) no. 1566, n. 106. Among the laws which have explicitly taken over the rule may be cited the German *Wechselordnung* (1849) 37, the Swiss Law of Obligations 756, and the Scandinavian Bill of Exchange Law (1880) 35. See also *Barry Colne and Co. v. Jackson Ltd.*, [1922] S. Afr. L.R., Cape Prov. Div. 372, (Sup. Ct. South Africa, 1922), decided under the Roman-Dutch law.

³ For instance, into the Italian Commercial Code 39.

⁴ See German Civil Code 244; Swiss Law of Obligations 84, par. 2; Austrian decree of the Minister of Finance, May 21/June 2, 1848, *Jus-tiz-Gesetzessammlung*, no. 1152; see Austrian Supreme Court, April 26, 1922, 5 *Die Rechtsprechung* 53.

⁵ Law on Bills of Exchange 41; Law on Checks 36, set out *infra*, n. 18.

⁶ See the report of the Commissioners on Uniform State Laws in the *Handbook* cit. *supra*, p. 419, n. 34. The Commissioners suggest incorporating an express provision thereon into the Uniform Negotiable Instruments Law.

⁷ The term has been adopted by the Geneva Uniform Laws, *infra*, n. 18.

⁸ *Supra*, p. 379; *infra*, p. 437, n. 2.

in mind that under civil law the debtor in the case of *mora* (default) is liable for damages.⁹ Therefore under the time-of-payment rule, if the currency contracted for declines after the maturity of the debt, the creditor will receive not only the equivalent of the nominal amount at the day of payment, but also the difference between that equivalent and the equivalent as of the date of maturity. Quite the other way, the creditor, under the time-of-maturity rule, will receive the benefit of any rise of the foreign currency relatively to the local currency that may occur after the date of maturity.

Therefore the same result will ordinarily be reached under either theory in case the foreign currency should depreciate relatively to the local currency after the day of maturity. The creditor will invariably obtain the equivalent as of the day of payment; since even under the day-of-maturity theory, he will obtain in addition to the equivalent as of the time of maturity, damages for delay between maturity and payment. Conversely, if the local currency depreciates after maturity, the loss incurred by the creditor under the time-of-payment rule will be made good. The clash between the two theories would ordinarily become apparent where the default of the debtor is excused as, for example, when nonpayment is due to war or revolution.¹⁰ There appears to have been no judicial consideration of such pleas in connection with foreign-currency debts.¹¹ The difference of judicial theories, therefore, is rather a matter of approach than of substance. In fact the great majority of course explicitly adhere to the time-of-payment theory.¹² This is the desirable

⁹ Limitation of damages to legal interest does not apply in this case, *supra*, p. 236, n. 19.

¹⁰ The French Civil Code 1147 and the Italian Civil Code 1225 only allow excuses by the debtor based on circumstances beyond his control; the attitude of the German courts is also very strict. *Reichsgericht*, April 12, 1918, *R.G.Z.* 92, 376.

¹¹ See, however, regarding default caused by exchange control or under the rule of a clearing-treaty, *infra*, sec. 37, at n. 60, sec. 39, n. 36.

¹² *Reichsgericht*, Feb. 20, 1920, *R.G.Z.* 98, 160, and Assembled Senates, Jan. 24, 1921, *R.G.Z.* 101, 312, both approving this writer's suggestions in *J.W.* 1920, 13. [In the case of bills of exchange, however, the time-of-maturity theory was adopted because of the language of the statute, *Reichsgericht*, July 1, 1924, *R.G.Z.* 108, 337, March 17, 1925, *ibid.* 110, 295]; Austrian Supreme Court, Apr. 25, 1922, 5 *Die Rechtsprechung* 17; Feb. 27, 1934, *ibid.* 1934, 64 [mortgage in terms of foreign currency; public sale of mortgage; conversion as of the day of payment rather than of the day of sale]; Appellate Court of Ghent, May 17, 1921, *Pasicrisie Belge* 1921 II 110; Appellate Court of Brussels, June 8, 1921, *ibid.* 1921 II 111; Mixed Appellate Court of Alexandria, Jan. 8,

course because even if the debtor is not in technical default the creditor should get the full value contracted for.¹³ As the Swiss Federal Tribunal well put it, the local-payment rule (from which the necessity of conversion arises) bears upon the "how" rather than upon the "how much" of the payment.¹⁴ Italian law, however, is at variance with the general view.¹⁵

1930, 23 *Revue de Droit Maritime Comparé*, 279; Appellate Court of Buenos Aires, Commercial Division, Sept. 30, 1924, 10 *ibid.* 72. The French courts have followed the same line, *Cour de Cassation*, Nov. 8, 1923, *J.D.Int.* 1923, 576; Dec. 5, 1927, *J.D.Int.* 1928, 660; March 19, 1930, *ibid.* 1931, 1082; July 8, 1931, *ibid.* 1932, 721; Appellate Court of Paris, Oct. 18, 1922, *ibid.* 1924, 119; July 15, 1925 *ibid.* 1926, 658. In 1937, however, probably under the pressure of the breaking franc, the *Cour de Cassation* turned to the time-of-maturity theory, Feb. 17 (13?), 1937, *J.D.Int.* 1937, 766. For discussions of the controversy see Hubrecht, *Stabilization du Franc et Valorization des Créances* (1928) 310; Scaduto, *I Debiti Pecuniari e il Deprezzamento Monetario* (1924) 120.

Congress has availed itself of the time-of-payment rule in the Private Bill of March 17, 1937 (c. 44), 50 Stat. 928 [payment to Australian company of a sum equivalent at the rate of exchange at the time of payment to £101 of Australian currency].

¹³ This rule, however, does not apply if the debtor made a good tender on the day of maturity. *Reichsgericht*, Dec. 12, 1924, *J.W.* 1925, 470 (unnecessarily requiring appropriation of the money to be tendered). The same theory seems to be the ratio decidendi in *Arbutnot v. Read*, House of Lords 1731/32, 24 *House of Lords' Journal* 54b. The briefs on appeal are to be found in Columbia University Law Library, 1 *Appeal Papers (House of Lords)* 356. See *infra*, n. 33. Similarly, if a check is presented to the bank after the period for collection has expired the holder is not entitled to the premium resulting from a subsequent appreciation of the foreign currency. *Cour de Cassation*, Nov. 10, 1926, *J.D.Int.* 1927, 699. (The decision would probably be different in the case of an "effective" clause, *supra*, p. 423).

¹⁴ Swiss Federal Tribunal, June 27, 1918, *Antliche Sammlung* 44 II 213; May 23, 1928, *ibid.* 54 II 257; Feb. 11, 1931, *ibid.* 57 II 69. The language of this court is sometimes in terms of day of maturity; however, where the foreign currency had depreciated after maturity of the debt, damages—equal to this decline—were awarded in case of the debtor's default. See Swiss Federal Tribunal Oct. 26, 1920, *Antliche Sammlung* 46 II 375, May 3, 1921, *ibid.* 47 II 190, Oct. 25, 1921, *ibid.* 47 II 438, Jan. 30, 1922, *ibid.* 48 II 74, Oct. 10, 1934, *ibid.* 60 II 337.

¹⁵ The Italian Courts which also use the local-payment rule, rely primarily on the wording of the Italian Commercial Code 39 which requires conversion as of the time of maturity, Italian Court of Cassation, May 11, 1925, *Monitore dei Tribunali*, 1925, 848; Jan. 10, 1927, *ibid.*, 1927, 122. While the lira was comparatively stable and even rising, the result was rather favorable to the foreign creditor. Under a more recent ruling, damages for delayed payment were restricted to legal interest where the debtor found it profitable to make payment in the foreign currency. Italian Court of Cassation, Jan. 15, 1934, *Foro Italiano*, 1934 I 391; July 20, 1936, *ibid.*, 1936 I 1118. Where, however, the debtor avails himself of the privilege of paying in the local currency, he remains liable for full damages. This is important because of the renewed depreciation of the lira. The debtor is thus prevented from taking unfair advantage of the time-of-maturity rule. The legal foundation of the distinction, however, is not clear. See also Ascarelli, "Lim-

Because of the uncertainty of the law, the International Law Association, in 1926, suggested the incorporation into contracts governing international transactions of a clause designed to provide a clear and common basis for the payment of foreign money debts (*Vienna Rules*, 1926¹⁴). Despite the laborious preparation and discussion of the clause, however, it has met with no success. The highly complicated structure of the clause reconciled the conflicting views within the association but failed to arouse the attention of the business world. It has probably never been used in actual contracts.¹⁷ The problem is obviously one to be solved by legislative or judicial methods. Real progress has been made in the international field by the pertinent provisions of the Geneva Laws on Bills of Exchange and Promissory Notes and on Cheques, 1931.¹⁸

Whatever the date used to determine the rate of conversion, the money stipulated (*monnaie de contrat*) and the money in which payment is made (*monnaie de paiement*) must be clearly distinguished.¹⁹ The "money of contract" is

iti di applicabilità dell'art. 1251 Cod. Civ., R.D.Comm. 1930 I 379. Recently, in a judgment of July 13, 1937, *Foro Italiano*, 1937 I 1124, the Appellate Court of Florence applied the time-of-payment theory to a multiple-currency situation.

¹⁴ International Law Association, *Report of the 34th Conference* (London, 1926) 543; Stourm, "*Les Règles de Vienne*", (1926) 14 *Revue de Droit Maritime Comparé* 52; (1927) 15 *ibid.* 18; Muller "*Les Règles de Vienne, 1926*", (1927) *Bull. I.I.J.* 17, 1; *J.D.Int.* 1926, 1139; Nussbaum, *Vertraglicher Schutz gegen Schwankungen des Geldwerts* (1928) 65 and 94.

¹⁷ For a criticism of the rules the failure of which was predicted see Nussbaum, *op. cit.*, 65. Unfortunately the fate of the Vienna Rules is by no means unique in the field of international legal endeavor.

¹⁸ *Supra*, n. 5. They read as follows (art. 49): "(I) When a bill of exchange is drawn payable in a currency which is not that of the place of payment, the sum payable may be paid in the currency of the country, according to its value on the date of maturity. If the debtor is in default, the holder may at his option demand that the amount of the bill be paid in the currency of the country according to the rate on the day of maturity or the day of payment. (II) The usages of the place of payment determine the value of foreign currency. Nevertheless the drawer may stipulate that the sum payable shall be calculated according to a rate expressed in the bill. (III) The foregoing rules shall not apply to the case in which the drawer has stipulated that payment must be made in a certain specified currency (stipulation for effective payment in foreign currency)."

In the Uniform Check Law (art. 36) the term "bill of exchange" is replaced by "cheque". By giving the creditor the choice between the date of maturity and the date of payment, the day-of-payment theory in combination with damages in the case of default for depreciation, has virtually been adopted.

¹⁹ Sometimes in French, "money of payment" is contrasted with "money of account", the latter, meaning the monetary unit; in this

the determining factor, and its fluctuations decide the financial fate of the transaction. The "money of payment" on the other hand, has only a technical importance, its fluctuations up to the time of payment being irrelevant, at least if the time-of-payment theory is followed. The proposed amendment to the American Negotiable Instruments Law contrasts the "amount expressed in terms of [foreign] money" (the money of contract) with the "*medium of payment*" (money of payment). The same provision also refers to a "particular *medium* in which payment is to be made". While in its first use "*medium*" refers to a currency, or to a monetary system, distinct from the monetary system referred to in the contract (the money of contract), in its second use the word signifies a special group of constituents of a given monetary system. This ambivalence is undesirable. It is regrettable that the Commission on Uniform State Laws did not take advantage of the great work done by the League of Nations, in the preparation of the Geneva Uniform Law.

II. *The Common Law Rule on Compulsory Conversion*²⁰

The dominant feature of the common law of foreign currency debts is compulsory judicial conversion. This practice developed in the middle ages. The creditor had a choice between two actions; he could sue the debtor for the foreign money (in "debt in the *detinet*")²¹ or (in the ordinary action

juxtaposition "money of payment" means currency. The antithesis is misunderstood by Swiss Federal Tribunal Feb. 11, 1931, *Amtliche Sammlung* 57 II 69, citing the guinea as an instance of "money of account" in the unit sense. "Guinea", however, is only another name for 21 shillings. Sometimes the "money of contract" is called "money of account", but it seems preferable to employ the latter term only for the ideal unit.

²⁰ Analyses of the many cases and varying viewpoints may be found in McCormick, *Damages* (1936) 190; Gluck, "The rate of exchange in the law of damages", (1922) 22 *Col. L.R.* 217; Negus, "Rate of exchange in reference to foreign debts", (1924) 40 *Law Q.R.* 149; Rifkind, "Money as a device for measuring value", (1926) 26 *Col. L.R.* 559; Drake, "The proper rule in fluctuating exchanges", (1930) 28 *Mich. L.R.* 229; Fraenkel, "Foreign moneys in domestic courts", (1935) 35 *Col. L.R.* 360; Pasching, "*Geldentwertung und Verzögerungsschaden*" in *Mitteilungen des Verbandes österreichischer Banken und Bankiers*, 1934, 37; Notes: (1927) 75 *U. of Pa. L.R.* 448; (1931) 172 *Law Times* 317; (1932) 80 *A.L.R.* 1374. Concerning foreign currency problems in unliquidated claims (on tort or other grounds), see *infra*, sec. 36.

²¹ Y.B. 34 Henry 6, 12 (*Mich. T. pl.* 23, 1455); *Rands v. Peck*, Cro. Jac. 618, 79 Eng. Rep. 527 (1622). This long defunct action, closely related to *detinue* (cf. 3 Blackstone *156) entitled the plaintiff to a conditional judgment for the foreign money or damages, the latter to be

of debt) for its equivalent in English money.²² The rule that judgment must be given in terms of domestic currency resulted, it seems, from the obsolescence of the former action. It was "received" by the American colonies which substituted pounds of their own for the pound sterling,²³ although the latter continued to enjoy preferential treatment to a certain extent.²⁴ After the creation of the American dollar, the federal and state courts' exclusive use of the dollar unit was fortified by the Coinage Act of 1792²⁵ and by various state acts long buried in oblivion.²⁶ The problem of foreign currency debts then is by no means modern although its greatest importance came after the World War because of the repercussions of the world monetary crisis upon international contractual relationships. At once the question of determining the date of conversion, which had been neglected in earlier cases, came to the fore.²⁷ In practice, the controversy turned about the choice between the day of the breach of contract which is coincident with the day of maturity ("breach-day

assessed by the jury, or in case of a default or decision on demurrer by an inquest. Y.B. 11 Henry 7, 5 (Mich. T. pl. 20, 1495); *Bagshaw v. Playn*, Cro. Eliz. 536, 78 Eng. Rep. 783 (1590).

²² The creditor's right to elect between the two remedies was recognized in *Willshalge v. Davidge*, 1 Leon. 41, 74 Eng. Rep. 38 (Exch. Ch., 1586) and *Ward v. Ridgwin*, Latch 84, 82 Eng. Rep. 286 (1625). If the creditor decided to sue in debt proper, he had to make the conversion in his complaint; should the debtor want to challenge the correction of the underlying computation he had to do so by plea in abatement. *Draper v. Rastal*, Cro. Jac. 88, 79 Eng. Rep. 75 (1605). In assumpsit only damages could be recovered, making conversion a matter of course. The use of assumpsit for foreign currency claims seems to belong to a later period. See *Harrington v. Macmorris*, 5 Taunt. 228, 128 Eng. Rep. 675 (Common Pleas, 1805).

Recently in *Richardson v. Richardson*, [1927] P. 228 (Prob. Div., 1927), involving recovery of an account in a foreign branch of an English Bank and in the local currency, of the place of that branch, the Court pointed out that damages for breach of contract rather than debt was the cause of action; this view was apparently inspired by the fact that the bank had allegedly refused to transfer the account to its London establishment.

²³ See *supra*, p. 167.

²⁴ For the Virginia law, see *supra*, p. 167, n. 26.

²⁵ Sec. 20, 1 Stat. 246 at 250. This section seems to have been never relied on even where the conversion rule was explicitly set out by Federal courts. See, e.g., *Frontera Transportation Co. v. Abaunza*, 271 F. 199 (C.C.A. 5th, 1921).

²⁶ *Supra*, p. 177, n. 27.

²⁷ Under the early common law the matter of damages was generally left to the jury, judicial supervision being very slight (Washington, "Damages in Contract at Common Law", (1931) 47 *Law Q.R.* 345 at 346). The problem of the date of conversion was, however, occasionally discussed in the action of debt in the *detinet* for non-delivery of grain rents. *Supra*, p. 404, n. 2.

rule") and the day of the judgment ("judgment-day rule").²⁸ English²⁹ and New York courts³⁰ have generally adopted the first rule, assimilating the situation to the case of a non-delivery of commodities owed.³¹ The Supreme Court of the United States, however, in *Deutsche Bank Filiale Nurnberg v. Humphrey*, ruled in favor of the judgment-day rule where the debt is payable outside the United States.³² Mr. Justice

²⁸ If the conversion is made by the jury, the trial day rule is substituted for the judgment day rule. The courts often use these concepts interchangeably. *Marburg v. Marburg*, 26 Md. 8 (1866); *Hawes v. Woodcock*, 26 Wis. 629 (1870); *Sirie v. Godfrey*, 196 App. Div. 529, 188 N.Y. Supp. 52 (1921). See also *Indian Refining Co. v. Valvoline Oil Co.*, 75 F.(2d) 797 (C.C.A. 7th, 1935). *Cropper v. Nelson*, Fed. Cas. No. 3417 (1811), was decided on a pure trial day theory.

²⁹ *Barry v. Van den Hurk*, [1920] 2 K.B. 709 (K.B., 1920); *Lebeaupin v. Crispin*, [1920] 2 K.B. 714 (K.B., 1920). Cf. *Di Fernando v. Simon*, [1920] 3 K.B. 409 (C.A., 1920). However, in the actions for a liquidated sum the judgment day rule was first applied in this situation, *Cohn v. Boulken*, 36 T.L.R. 767 (K.B., 1920) (trial day), see Fraenkel, "Foreign Moneys in Domestic Courts", (1935) 35 Col. L.R. 360, at 379-382 (1935), but later on the breach-day rule was employed instead. *In re British American Continental Bank*, [1922] 2 Ch. 575 (C.A., 1922) (claim in the winding-up of a company); *Uliendahl v. Pankhurst*, 39 T.L.R. 628 (K.B., 1923); *Peyrae v. Wilkinson*, [1924] 2 K.B. 166 (K.B., 1924); *Ottoman Bank v. Chakarian*, [1930] A.C. 277 (Privy Council, 1930). In favor of the breach-day rule, the Scottish case *Macfie's Judicial Factor v. Macfie*, 1932 Sc. L.T. Rep. 460 and *McDonald v. Wells*, 45 C.L.R. 506 (High Court of Australia, 1931).

³⁰ *Hoppe v. Russo-Asiatic Bank*, 235 N.Y. 37, 138 N.E. 497 (1923); *Kantor v. Aristo Hosiery Co., Inc.*, 222 App. Div. 502, 226 N.Y. Supp. 582 (1928), *aff'd* 248 N.Y. 630, 162 N.E. 553 (1928); *Sokoloff v. National City Bank*, 250 N.Y. 69, 164 N.E. 745 (1928). The courts may have been influenced by the able article, cited *supra*, n. 20, of Mr. Gluck, who advocated the breach-day rule. The confederate-currency cases are not helpful here, *Parker v. Hoppe*, 258 N.Y. 365, at 370, 179 N.E. 770 at 771 (1932).

The breach-day rule has also been used in *Butler v. Merchant*, 27 S.W. 193 (Texas, 1894) (regarding depreciated Mexican currency).

³¹ If enforcement of a foreign judgment is applied for, the day of rendition of this judgment has been considered as the "breach day", *Lloyd Royal Beige v. Louis Dreyfus & Co.*, 27 Lloyd's L.R. 283 (C.A., 1927); *Re MacDonough-Werfa*, 1934 Am. Mar. Cas. 234 (D.C.S.D.N.Y., 1934). In a case where a bequest in foreign money was made for keeping burial ground and monument in repair, the day of maturity according to the law of bequests (first anniversary of the death of the testator) was held the day of conversion, *In re Eighthie-Colbourne v. Wilks*, [1935] Ch. 524 (Ch., 1935).

³² 272 U.S. 517 (1926). The language of the decision creates the impression that the day on which the suit was brought was the law day. (Cf. *Draper v. Rastal*, *supra*, n. 22). The record of the case, however, indicates that the judgment day was meant by the court. *Royal Ins. Co. v. Compania Trasatlantica Española*, 57 F.(2d) 288 at 292 (D.C.E.D.N.Y., 1932). The case has accordingly always been regarded as adopting the judgment-day rule. (Fraenkel, *loc. cit.*, at 385).

The main point in the *Deutsche Bank* case is the distinguishing of *Hicks v. Guinness*, 269 U.S. 71 (1926). In the latter case which used the breach-day rule, the mark debt was payable within the United States. The *Guinness* case has become noteworthy in the conflict of laws theory

Holmes, who delivered the opinion of the Court, pointed out that a foreign-currency debt payable in the United States falls under the power of American law as soon as the time of maturity arrives, and is thus transformed into a dollar debt; if, however, the debt is payable outside the United States, the transforming power of American law comes into play only when the case is adjudicated by the American court.³³ The Restatement of Conflict of Laws has adopted this distinction.³⁴

through the opinion of Judge Learned Hand rendered in the Court of first instance (*Guinness v. Miller*, 291 Fed. 769 (S.D.N.Y., 1923)). Judge Hand there rejected the conception according to which a court in conflicts cases is called upon to enforce rights created under a foreign sovereignty ("vested rights" theory); instead, he points out, the forum merely creates a right of its own "as nearly homologous as possible" to the right created by the foreign law ("local-law" theory). The assertion of this tenet is probably to be explained, at least genetically, in terms of the compulsory conversion rule which was applied by the court. The contrast between the two theories, however, was elaborated by later discussions independent of that connection. Adjudication of the *Guinness* case itself, regardless of its outcome, is certainly not predicated upon the adoption or rejection of one or the other of the two theories which were not touched upon by the Supreme Court.

The federal conversion rule is procedural in nature and may also be considered as an interpretation of sec. 20 of the Coinage Act of 1792, *supra*, n. 25. It is therefore not affected by *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), which had authorized the federal courts to establish substantive rules of their own.

³³ This was followed in *Zimmerman v. Sutherland*, 274 U.S. 253 (1926); *Thornton v. National City Bank*, 45 F.(2d) 127 (C.C.A. 2d, 1930); *Tillman v. Russo-Asiatic Bank*, 51 F.(2d) 1023 (C.C.A. 2d, 1931), *cert. den.* 285 U.S. 539 (1932); *Royal Ins. Co. v. Compania Transatlantica Española*, 57 F.(2d) 288 (D.C.E.D.N.Y., 1932), see also *Matter of the estate of King*, 129 Misc. 244, 221 N.Y.S. 730 (1927). The distinction made by the Supreme Court is by no means novel. It was explicitly used as early as 1731 by the Court of Chancery in *Arbuthnot v. Read*, *supra*, p. 425, n. 13. The case involved a debt payable in France in French money, which had appreciated after maturity. The decree ordered conversion as of the judgment day because the debt was payable in France. Judgment was reversed by the House of Lords, probably on other grounds, see n. 13. American cases holding the actual rate of exchange rather than the mint par to be applicable not infrequently refer to the trial day or judgment day where the debt was payable in a foreign country. *Taan v. Le Gaux*, 1 Yeates (Pa.) 204 (1793); *Smith v. Shaw*, Fed. Cas. No. 13,107 (C.C. Pa., 1808); *Lee v. Wilcocks*, 5 Serg. and R. (Pa.) 48 (1819) (debt probably payable abroad); *Grant v. Healy*, Fed. Cas. No. 5,696 (C.C. Mass., 1839); *Marburg v. Marburg*, 26 Md. 8 (1866); *Hawes v. Woolcock*, 26 Wis. 629 (1870). More recent cases based on the same distinction are *The Hurona*, 268 Fed. 910 (S.D. N.Y., 1920); *Sirie v. Godfrey*, 196 App. Div. 529, 188 N.Y. Supp. 52 (1921); *Liberty Nat. Bank v. Burr*, 270 Fed. 251 (1921); *Met-calf Co. v. Mayer*, 213 App. Div. 607, 211 N.Y. Supp. 53 (1925), and perhaps *Manners v. Pearson*, [1898] 1 Ch. Div. 581 (C.A., 1898). Text writers adopted the same standpoint up to about 1920. 2 Wharton, *Conflicts of Laws* (3d ed., 1905), n. 514-517; Westlake, *Private International Law* (5th ed., 1912), sec. 226 (but see the 7th ed., 1925); 1 Sutherland, *Damages* (4th ed., 1916), sec. 213.

³⁴ Restatement of Law, *Conflict of Laws* (1934), secs. 423, 424.

The English and American cases have generally arisen when foreign currency had depreciated in terms of domestic currency; the breach-day rule therefore favored the plaintiff who in these proceedings is frequently a foreigner. In some of the cases, however, the currency contracted for had appreciated after the "breach-day" in relation to the dollar,³⁵ and the use of the day of breach rule resulted in loss to the foreign plaintiff. On the whole the depreciation of the English pound and of the dollar has been passed on surprisingly seldom by common law courts.

Conversion operates only after it has been ordered by the court. The debtor may, even subsequent to the breach-day, discharge his debt, by payment or otherwise, in the depreciated currency contracted for if the court has not yet spoken.³⁶ And there is no occasion for conversion in a declaratory judgment on a debt in a foreign currency.

III. Critique of the Common Law Rule

Compulsory conversion of foreign currency debts has sometimes been considered a matter of course in this country.³⁷ However, there is no logical impediment to a judgment being phrased in terms of a sum of foreign currency or in terms of the equivalent, at the time of collection, of such a sum. As a matter of fact, the Anglo-American rule results

³⁵ *Page v. Levenson*, 281 Fed. 555 (D.C. Md., 1922); *Sulka v. Brandt*, 154 Misc. 534, 277 N.Y. Supp. 421 (App. Term, 1935).

³⁶ *Zimmerman v. Sutherland*, *supra*, n. 33; *Société des Hôtels Le Touquet Paris-Plage v. Cummings*, [1922] 1 K.B. 451 (C.A., 1921), cited in the *Deutsche Bank* case; see also *Sirie v. Godfrey*, *supra*, n. 33, and *The Baarn*, [1933] P. 251 (C.A., 1933). This rule worked out in the reverse way in *Matter of James*, 248 N.Y. 1, 161 N.E. 201 (1928). The plaintiff had sued in France upon a New York judgment and had secured a French decree of exequatur on a sum of francs calculated according to the rate of exchange prevailing at the date when the French proceedings were instituted. The defendant subsequently paid the sum in depreciated francs. On suit brought in New York it was held that the New York judgment was merged into the French decree and satisfied by payment in francs, so as to preclude further action thereon in New York. It is very strange that a New York court should submit to an alteration by a French court, of a New York judgment; still the adjudication seems justifiable on the ground that the plaintiff in the French court by converting the dollars into francs was estopped from again demanding dollars.

The question whether depositing of the sum due with the Court, or any other acts, discharge the debt, is controlled by the law governing the debt, at least where that law is, at the same time, the *lex loci solutionis*. *Zimmerman v. Sutherland*, *supra*, n. 33; *The Baarn*, *supra*.

³⁷ See Note, (1926) 26 Col. L.R. 209.

in a sweeping change of the contract, completely overriding the intent of the parties which is generally considered the law of the contract. If the parties have for good reasons phrased their agreement in terms of pounds sterling, and suit is brought in an American court, possibly because the debtor has moved from England to the United States, the court will hand down a dollar judgment, thus subjecting the parties to a monetary risk entirely different from that intended. If subsequently the pound rises in relation to the dollar, the debtor will be the victim; in the case of a decline of the pound, the creditor will suffer. The debtor is usually better off, however, inasmuch as until judgment is rendered he may gamble at the expense of the creditor, either making payment in the contractual currency, or allowing the court to pass judgment, depending on developments in the foreign exchange market. When the pound sterling offered particular assurances of stability, bringing suit in the English courts was especially attractive to foreign plaintiffs able to submit the case to English jurisdiction.³⁸

On the other hand, conversion into the local currency is usually inevitable in enforcing a judgment for payment of foreign money, since compulsory liquidation of the debtors' property at public sale will yield local currency. In order to secure to the creditor exactly what is due him, conversion should be made as of the day of collection. This suggests that judgments should be expressed in an amount of the local currency equivalent at the time of collection to an amount of foreign currency definitely indicated in the judgment; for instance an American judgment would run this way: defendant is liable to pay so many dollars as at the time of collection will be equivalent to £100. The rule that allows only judgments in terms of the local currency would also be safeguarded thereby. The formula suggested is that in use by the French courts.³⁹ It is, however, probably in conflict with

³⁸ This was particularly true in the case of *The Baarn*, *supra*, n. 36, where the Chilean plaintiffs succeeded in a suit against the Dutch shipowners for pounds sterling in the English courts, whose jurisdiction they had established by attachment. Similar advantages were offered by the American rule. However, when a plaintiff who had collected a French dollar-judgment in francs at an unfavorable rate tried to recover the difference in an American court, he failed. *The Connes Peak*, 1928 Am. Mar. Cases 507 (D.C. S.D. Texas, 1928).

³⁹ *Infra*, at n. 55.

the traditional prejudice of the common law in favor of definiteness of judgments.⁴⁰ It also raises a technical difficulty inasmuch as the task of converting one currency into another cannot properly be left to the sheriff (or marshal).⁴¹ In this connection it is remarkable that in a declaratory judgment the day-of-payment rule was used by an English court.⁴²

Although these impediments are not insuperable, the traditional rule may be taken as practically unshakable. Assuming that to be true, at least the judgment-day rule should be substituted for the breach-day rule in the event that the local currency has depreciated after the day of breach. Probably the post-war expansion of the breach-day rule is partly due to the fact that the pound and the dollar have been stable for so long. In any event, it is unjustifiable to impose upon the creditor the loss by depreciation caused by the debtor's default. It is true that the time when judgment is rendered depends partly upon the promptness of the creditor in pursuing his right and on the vicissitudes of judicial procedure,⁴³ but this shortcoming of the judgment-day rule is insignificant in the face of the gross injustice done by the breach-day rule in the situation mentioned. Location of the place of payment should be deemed entirely irrelevant. As has been pointed out the law of this place should determine merely the manner of payment.⁴⁴ There appears to be no reason why one who has promised to pay £1000 should be bound to pay a wholly different amount according to whether London or New York is the place of payment, the only difference, that of the cost of forwarding, being insignificant.⁴⁵ Mr. Justice Holmes ad-

⁴⁰ See 1 Black, *On Judgments* (2d ed., 1902), sec. 118.

⁴¹ That the ordinary writ of execution would not be appropriate to the situation was pointed out by Lindley, M.R., in *Manners v. Pearson & Son*, [1898] 1 Ch. 581, at 587 (C.A., 1898). The development of the Virginia law also illustrates this point. *Supra*, p. 167, n. 26.

⁴² *Kornatzki v. Oppenheimer*, [1937] 4 All E.R. 133 at 140 (Ch. D., 1937). The American Private Bill, cited *supra*, p. 425, n. 12, is likewise in point.

⁴³ This is the common objection to the judgment-day rule, see, e.g., Sutherland, J., dissenting, in the *Deutsche Bank* case (*supra*, n. 32) at 523; *Page v. Levenson*, 281 Fed. 555, at 559 (D.C. Md., 1922); *Macfie's Judicial Factor v. Macfie*, 1932 Sc. L.T. Rep. 460. Concerning Mr. Justice Sutherland's opinion, see also *infra*, n. 45 and 46.

⁴⁴ *Supra*, p. 379.

⁴⁵ That the costs of forwarding are to be borne by the debtor was decided as early as *Elkins v. East India Company*, 1 Pere Williams 395, 24 Eng. Rep. 441 (1717), *aff'd* 2 Bro. P.C. 382, 1 Eng. Rep. 1011 (1718). It is in this connection that Lord Eldon, in *Cash v. Kennion*,

vanced the theory that the amount of foreign currency, if payable in the United States, is *ipso facto* transformed into a dollar amount,⁴⁶ but that view is inconsistent with the rule that the debtor may make payment in the foreign currency after maturity, before judgment is rendered.⁴⁷

From a strictly scientific point of view, the first question to be determined is which law applies to the foreign currency debt.⁴⁸ In case the debt is governed by foreign law, damages or revaluation as well as interest are to be granted in accordance with that law; the total thus ascertained being convertible into local currency at the rate obtaining on the day of payment, or if this is not permitted, at the rate on the day of judgment. Where the debt is governed by the law of the forum, restriction of damages to interest should not apply;⁴⁹ to that extent the commodities analogy may be used.⁵⁰

These may be somewhat academic reflections. The common law rule which virtually disregards the foreign law in respect to interest, damages and revaluation, has at least

11 Ves. Jun. 314, 32 Eng. Rep. 1109 (1805), used these phrases: "I cannot bring myself to doubt, that, where a man agrees to pay 100*l.* in London upon the first of January, he ought to pay that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed." This language has frequently been relied upon to solve the conversion problem, e.g., by Lindley, M.R., in *Manners v. Pearson*, [1898] 1 Ch. 581 at 588, and Sutherland, J., in the *Deutsche Bank* case (*supra*, n. 32) at 522. Lord Eldon's utterance, however, does not bear upon the conversion problem at all (Vaughan Williams, L.J., dissenting in *Manners v. Pearson* at 593), nor does it state "what the creditor would have had, if the contract had been performed" (Negus, "Rate of Exchange and Foreign Debts", 40 *Law Q.R.* 149) and it is by no means a basis for the breach-day rule.

⁴⁶ The same notion reappears in the dissenting opinion of Mr. Justice Sutherland, cited n. 45, at 521.

⁴⁷ The somewhat mystical notion of the creditor's right being translocated to America by the institution of the American lawsuit needs no discussion here. It bears upon the theory of conflict-of-laws; see 3 Beale, *Conflict of Laws*, Appendix, chap. III: Current Doctrine on the Conflict of Laws; de Sloovere, "The Local Law Theory and its Implications in the Conflict of Laws", (1928) 41 *Harv. L.R.* 421, discussing these cases at 429.

⁴⁸ This was done in *Deutsche Bank v. Humphrey*, 272 U.S. 517 (1926), in order to justify the choice of the judgment day, and in *Zimmerman v. Sutherland*, 274 U.S. 253 (1926), where the deposit of the sum owed in court was recognized as a discharge of the debt under Austrian law. In virtually every case, however, the matter of damages was disposed of by the English and American courts by the use of their own conversion rule.

⁴⁹ *Supra*, p. 236.

⁵⁰ See McCormick, *Handbook on the Law of Damages* (1935) 183.

the merit of simplicity where perfect justice can hardly be obtained. By a shift from the breach-day to the judgment-day rate where the local currency has depreciated, the rule would become more acceptable.

IV. *Enforcement of Foreign Currency Debts in Civil Law. Set-off*

Judgments in terms of a foreign currency have been held lawful in German,⁵¹ Austrian,⁵² Italian,⁵³ and other⁵⁴ civil law courts. French courts, though allowing the plaintiff to bring his suit for a sum in foreign currency, generally articulate the adjudication in terms of francs equivalent, at the time of payment, to the sum contracted for⁵⁵ with practically the same result as is reached by the other civil law courts.⁵⁶ In Germany some doubts have sprung up as to the proper procedure in the execution of the judgment;⁵⁷ but no serious dif-

⁵¹ *Reichsgericht*, Dec. 16, 1922, *R.G.Z.* 106, 74; Bavarian Supreme Court, Sept. 25, 1922, *Leipziger Zeitschrift*, 1922, 654; Appellate Court of Berlin, March 10, 1923, *J.W.* 1924, 411.

⁵² Supreme Court of Austria, June 15, 1921, 4 *Die Rechtsprechung* 67.

⁵³ Appellate Court of Genoa, Nov. 30, 1923, *Monitore dei Tribunali*, 1924, 454.

⁵⁴ The Swiss Law on Enforcement of Debts (*Schuldbetreibungsgesetz*) of April 11, 1889, provides that, for purposes of execution, foreign currency must be converted into Swiss money. This presupposes judgments couched in terms of foreign currency. Conversion is limited here to the purposes of execution; it does not deprive the debtor of his privilege to make payment in foreign currency. Swiss Federal Tribunal, Dec. 1, 1920, *Amliche Sammlung* 46 III 403. Judgments in terms of foreign currency are, or at least were permitted also in Norway, International Law Association, *Report of the 34th Conference* (1926) 559; Poland, *ibid.* 573; Sweden, Kôersner, "*Etude de la question des changes*", *Memoire présenté à la Conférence de l'International Law Association* (1926) 18 and 26; and by the Egyptian Mixed Courts, Appellate Court of Alexandria, June 7, 1934, *J.D.Int.* 1934, 1007.

⁵⁵ *Cour de Cassation*, Dec. 5, 1927, *J.D.Int.* 1928, 660; March 19, 1930, *ibid.*, 1930, 1082; Appellate Court of Paris, June 16, 1933, *ibid.*, 1934, 938. In a judgment of Feb. 17 (13?), 1937, *J.D.Int.* 1937, 766 the *Cour de Cassation* proclaimed that on principle all payments within France must be made in French francs, a doctrine duly objected to in a note at 768. In fact no "effective" clause was involved in this case. The same Court, March 21, 1933, *ibid.*, 1934, 373, held good a judgment requiring a Swiss defendant to make payment in Swiss francs. See also *Cour de Cassation*, April 23, 1928, *D.H.* 1928, 302.

⁵⁶ Except that under the French rule the creditor is entitled to a payment in local currency, whereas under the prevailing civil law rule the option is in the debtor.

⁵⁷ The cases cited in n. 51 hold the general rules on compulsory enforcement of money judgments directly applicable to judgments framed in non-German money. This ended a doctrinal controversy. See Nussbaum, *Das Geld* (1925) 195.

ficulties appear to have arisen, either in Germany or elsewhere, in the enforcement of judgments, directly or indirectly requiring conversion as of the day of payment. In case of bankruptcy, conversion into the national currency is a matter of course, since the realization of the estate and the distribution of the proceeds to the creditors can only be carried out on that basis; the day of adjudication is the day of conversion.⁵⁸ The whole problem is losing importance through the expansion of exchange control which is apt to bar suits calling for payment in foreign currency.⁵⁹

A set-off between debts involving different monetary units is generally not permissible under civil law because homogeneousness of the two debts is a prerequisite of the right of set-off.⁶⁰ However, in case the debtor owing foreign currency has the power to make payment in local currency, he may set off his indebtedness against a claim for payment in local currency held by him against his creditor.⁶¹

⁵⁸ *Cour de Cassation*, Nov. 17, 1930, *J.D.Int.* 1931, 1043; Appellate Court of Paris, Feb. 7, 1925, *J.D.Int.* 1926, 391; Appellate Court of Genoa, June 12, 1928, *Foro Italiano*, 1928 I 1054; Appellate Court of Ghent, May 16, 1929, *Pasicrisie Belge*, 1930 II 26. For further references, see 7 Travers, *Le Droit Commercial International* I (1935), n. 11361-11367, and 2 Jaeger, *Konkursordnung* (6th and 7th ed., 1936) 244 note 8.

⁵⁹ *Infra*, sec. 37. The creditor will ordinarily be content with a judgment in the local currency. Austrian Supreme Court, Feb. 1, 1933, *Die Rechtsprechung*, 1933, 28, is illustrative.

⁶⁰ Austrian Supreme Court May 2, 1923, 5 *Die Rechtsprechung* 319; Sept. 9, 1924, 6 *ibid.* 220; July 30, 1924, *ibid.*, 1925, 8 (*contra*: Feb. 6, 1934, *ibid.* 1934, 144); Appellate Court of Hamburg, July 7, 1924, *Hanseatische Gerichtszeitung*, 1924, 198; same Court, Oct. 22, 1937, *Hanseatische Rechts- und Gerichtszeitschrift*, 1937 B 452; Supreme Court of Luxemburg, March 2, 1923, 11 *Pasicrisie Luxembourgeoise* 136, extensively quoted in 7 Travers, *Le Droit Commercial International*, I (1935) n. 11367. See also *Thornton v. Nat. City Bank of New York*, 45 F.(2d) 127 (C.C.A. 2d, 1930). *Contra*: Swiss Federal Tribunal, Oct. 26, 1937, *Ämtliche Sammlung*, 63 II 383; Appellate Court of Ghent, May 16, 1929, *Pasicrisie Belge*, 1930 II 26. In the Hamburg judgment of 1937 the defendant owed pounds, while the plaintiff owed marks. Set-off was refused on the ground that because of German exchange control, the plaintiff would not be able to convert marks into pounds. Foreign exchange control preventing discharge of the set-off debt may be disregarded as contrary to the public policy of the forum. Swiss Federal Tribunal, *supra*. However, where no set-off is admissible a right of retention may be available to either debtor, and this is also frequently true in common law where set-off can only be accomplished through the court. See 3 Williston, *Contracts* (rev. ed., 1936), sec. 887G.

⁶¹ *Reichsgericht*, Dec. 20, 1922, *R.G.Z.* 106, 99; Austrian Supreme Court, May 2, 1923, 5 *Die Rechtsprechung* 319; Appellate Court of Hamburg, cited in preceding note. Moreover, a set-off between currencies of different denomination may be accomplished by agreement, the rate of exchange being the measure; Appellate Court of Milan, Dec. 29, 1925, *Monitore dei Tribunali* 1926, 174. See also 3 Neumeyer, *Internationales Verwaltungsrecht* part 2 III (1930) 137.

SECTION 34

DETERMINATION OF THE "MONEY OF CONTRACT"

I. *Ambiguous Currency Names and Similar Cases*

The resolution of doubts concerning the "money of contract" became important after the World War when the currencies of the various countries entered their fateful path of shock and breakdown.¹ Interpreting the money of the contract to be dollar or pound or Swiss franc was in many cases financially tantamount to the construction of a gold clause. It is therefore not surprising to find that the attitude of the judiciary toward this question was similar to that toward the gold clauses proper.

Controversies concerning the identity of the "money of contract" were and still are particularly frequent in cases of contracts made between nationals or residents of different countries which use the same denomination for their monetary units, such as a "dollar" contract between a Canadian and a resident of the United States. In such a situation it is usual to look to the place of payment.²

¹ There are some earlier cases: *Dorrance v. Stewart*, 1 Yeates (Pa.) 349 (1794) (Pennsylvania or Connecticut pounds?); *Quimby v. The Euphemia*, Fed. Cas. No. 11, 512 (D.C. about 1843) (seaman's wages in sterling or in Newfoundland pounds?). Both cases are to be explained on their own facts. For pre-war cases decided on a place-of-payment theory, see n. 2.

² This is set out with particular clarity in the German Commercial Code 361 "measure, weight, currency, time computation, and distance denominations as customary at the place of payment are to be considered as contracted for in case of doubt." Similarly Austrian Civil Code 905 par. 1(2) and Commercial Code 338; Brazilian Civil Code 947. See *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122 (H. of L., 1933) at 156; *Trecartin v. The Rochambeau*, Fed. Cas. 14, 163 (C.C.D. Maine, 1865); *Benners v. Clemens*, 58 Pa. 24 (1868); *In re Tillam, Boehme and Tickle Pty., Ltd.*, [1932] Vict. L.R. 146 (Sup. Ct. of Victoria, 1931); *Joffe v. African Life Assurance Soc.*, [1933] S. Afr. L. Rep., Transv. Prov. Div. 189 (Sup. Ct. of S. Africa, 1932); *Mundell v. Radcliffe*, [1933] High Court of Southern Rhodesia Rep. 59 (1933); *Aktiebolaget Tratalja v. Evelyn Haddon & Co. Ltd.*, [1933] S. Afr. L. Rep., Cape Prov. Div. 156 (Sup. Ct. of S. Africa, 1932); *Cour de Cassation*, Nov. 18, 1895, *J.D.Int.* 1896, 381; Appellate Court of Paris, Jan. 29, 1923, *D.P.* 1923 II 129; March 6, 1923, *J.D.Int.* 1924, 683, and the references given *infra*, n. 7 and 8.

A different rule has been adopted by the English *Coinage Act*, 1870, 33 Vict., ch. 10, sec. 6, which provides "that . . . every transaction . . . relating to money . . . shall be made . . . according to English coin unless the transaction is made . . . according to the

That rule has sometimes been said to be merely an application of the rule that the "manner of payment" is determined by the law of the place of payment. Such a view is not without danger of confusion. The hour and locality of payment as well as the question whether or not the debtor may discharge a foreign-currency debt in local money may be subsumed under "manner of payment". But the determination of the money of contract involves the substance of the debt. Nevertheless, as a matter of fact, if not of law, it does seem justifiable to interpret an ambiguous currency stipulation in terms of the currency of the place of payment, because if one promises to pay dollars in New York, one naturally thinks of United States currency, even though the contract was perhaps made in, and had other important contracts with Canada.³

The instance given explicitly presupposes that the promisor, or generally speaking, the parties, actually envisaged a definite place of payment. The rule has particular importance in the case of bills of exchange where this requirement

currency of some British possession or some foreign state." Lord Tomlin, in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122 at 144 (H. of L., 1933) remarked: "I confess that I find difficulty in assigning any meaning of precision to this obscure section." However the rule seems to mean that agreements regarding currency should be construed, in case of doubt, as contemplating English currency. Such a construction is rendered more probable by the Irish currency assimilation act (1825), 6 Geo. IV, c. 79. This statute on which the 1870 provision was obviously modeled, establishes under certain conditions, a presumption in favor of the English currency. Little merit can be attributed to the theory used in *Corporation des Obligations Municipales limitée v. Ville de Montréal Nord*, 59 Rapports Judiciaires Québec, Cour Sup. 550 (Superior Ct., 1921), according to which the monetary unit (dollar) of the law applicable (American law) is the money of contract.

In the case of multiplicity of places of payment a special problem is presented, *infra*, sec. 35.

³ Confusion of money of contract and money of payment appears particularly in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122 (H. of L., 1933), holding that pounds payable as dividends in Australia, meant Australian pounds. Said Lord Warrington of Clyffe, "Monetary obligations are effectually discharged by payment of that which is legal tender in the *locus solutionis*". (at 138). In fact the Court was concerned with the money contracted for. The medium of discharge was irrelevant. Even more doubtful is Lord Wright's statement (at 151) that an essential element in the law of the foreign place of payment is the law of currency or legal tender in that place. The question was of the *currency*, and not of the *law* of the place of payment, and this currency is by no means an "essential element" of that law. Contracts in a foreign currency occur everywhere. The inexact language of the Court has infected other decisions, see the *British and French Trust case*, *supra*, p. 383.

is ordinarily satisfied.⁴ It has also been held that a Frenchman who had an overdrawn "francs" account with a Swiss bank owed Swiss francs, since the balance was payable at the bank's domicile.⁵ Similarly Swiss insurance companies have ordinarily been required to pay Swiss francs on insurance policies, payable in Switzerland in "francs".⁶ Although these instances can be multiplied,⁷ the place of payment theory should not be applied⁸ in a rigid way to the ambiguous currency situation, particularly, where the place of payment must be ascertained by implication or construction. The conduct of the parties after the conclusion of the contract will frequently furnish the most valuable clues as to the money contracted for.⁹ In insurance cases especially, courts of va-

⁴ The Geneva Uniform Law for Bills of Exchange and Promissory Notes, 1931, art. 41, par. 4, provides: "If the amount of the bill of exchange is specified in a currency having the same denomination, but a different value in the country of issue than the country of payment, reference is deemed to be made to the currency of the place of payment." Same: Geneva Uniform Law of Cheques, art. 36, par. 4.

⁵ *Cour de Cassation*, March 1, 1926, *J.D.Int.* 1926, 661, see also judgment of April 15, 1926, *ibid.*, 1926, 970; but the sounder view prevailing in these cases was abandoned in the decision of August 2, 1926, *J.D.Int.* 1927, 103. In *Sheppard v. First International Bank of Sweet Grass*, [1924] 1 D.L.R. 582 (Alberta Sup. Ct., Appellate Div., 1924), the defendant, a Montana frontier bank, conducted accounts in both United States or in Canadian dollars. Held that a Canadian farmer had to be contented with payment of Canadian dollars, since there was no agreement to the contrary.

⁶ See *infra*, p. 460, n. 56.

⁷ See *Simms v. Cherrenkoff*, 62 D.L.R. 703, (Sask. K.B., 1921); *Joffe v. African Life Assurance Soc. Ltd.*, [1933] S. Afr. L.R., Transv. Prov. Div. 189 (Sup. Ct. of S. Africa, 1932). In the latter case the defendant company was held to owe South-African pounds, Capetown being the place of payment, although the policy was governed by the law of South-Rhodesia the pound of which had depreciated.

⁸ As is sometimes done by German, Austrian and Swiss courts. *Reichsgericht*, Sept. 29, 1919, *R.G.Z.* 96, 270 at 272; Supreme Court of Austria, July 13, 1921, 4 *Die Rechtsprechung* 69 and Jan. 11, 1922, 4, *ibid.* 170; Swiss Federal Tribunal May 29, 1923, 12 *Praxis des Bundesgerichts* 233 and Feb. 14, 1924, *Amtliche Sammlung* 50 II 27.

⁹ Examples are furnished by *New York and Pennsylvania Co. v. Davis*, 9 F.(2d) 911 (C.C.A. 3d, 1925), *cert. den.* 271 U.S. 673 (1926); *Ottoman Bank of Nicosia v. Dascalopoulos*, [1934] A.C. 354 (Privy Council, 1934); *Ehmka v. Border Cities Improvement Co.*, 52 Ont. L.R. 193 (Sup. Ct. of Ont., 1922); Swiss Federal Tribunal, Nov. 6, 1923, *Amtliche Sammlung* 49 II 397; Appellate Court of Hamburg, June 18, 1924, *Hanseatische Gerichtszeitung* 1924, 229.

In *Myers v. Union Natural Gas Co.*, 53 Ont. L.R. 88 (Sup. Ct. of Ont., 1922), conclusiveness of certain conduct of the parties in giving and receiving American dollars in payment, was denied for special and plausible reasons; similarly *Ottoman Bank v. Chakarian*, [1930] A.C. 277 (Privy Council, 1930), and Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.*, 1929, 497 at 502 in case of the *Crédit Franco-Canadien*. See also *Re Taital Nitrate Co., Ltd.*, 73 L.T.R. 422 (Ch., 1895).

rious countries have properly emphasized the currency in which premiums were paid when a discount developed between the two synonymous currencies.¹⁰ Again, in the case of long-term mortgage investments attention should be paid to the currency used in the territory of the mortgaged real estate rather than to the currency used at the place of payment.¹¹ Other considerations varying with circumstances may prevail in adjudicating cases of ambiguous currency denominations.¹² Thus, the addition of the word "sterling" to

¹⁰ *Weiss v. State Life Ins. Co.*, [1934] 4 D.L.R. 469 (Ontario Court of Appeal, 1934) (Indianapolis, United States, domicile of the defendant and place of payment; actual payments in Canadian dollars; the latter the money of contract); *French Cour de Cassation*, June 13, 1928, *J.D.Int.* 1929, 112; Nov. 28, 1932, *ibid.*, 1934, 134; Civil Tribunal Seine, April 8, 1922, *ibid.*, 1922, 658; Civil Tribunal Lyon, Feb. 9, 1924, *ibid.*, 1925, 741; Swiss Federal Tribunal, March 1, 1923, 12 *Praxis des Bundesgerichts* 175 (fire insurance); Supreme Court of Czechoslovakia May 12, 1937, *Prager Juristische Zeitschrift*, 1937, 590; Mixed Appellate Court of Alexandria, Jan. 25, 1923, *J.D.Int.* 1924, 774, and March 30, 1927, *Revue du Droit Bancaire*, 1928, 351; Nov. 12, 1924, *J.D.Int.* 1926, 206; Nov. 26, 1924, *ibid.*, 1926, 207; March 10, 1926, *Revue du Droit Bancaire*, 1927, 368; the first and second Alexandria cases cited above awarding Egyptian (gold) francs, the rest French francs. The different results were the consequences of differences in the subsequent conduct of the parties.

¹¹ The course of the courts is not in accord with this view. *Johnson v. Pratt*, [1934] 2 D.L.R. 802 (Manitoba King's Bench, 1934); Supreme Court of Czechoslovakia, May 18, 1920, 4 *Die Rechtsprechung*, 29 and August 31, 1920, 5 *ibid.* 206, both cases referring to litigation originating in the dismemberment of the Austrian monarchy, *supra*, p. 151.

But see *Connor v. Earl of Ellamont*, 2 Atk. 382, 26 Eng. Rep. 631 (Ch., 1742) (loan contracted in England, Irish mortgage; Irish interest rate allowed. The case has also been cited for its alleged interpretation of a "pound" stipulation in terms of Irish currency) and *McClelland v. Trustees, Executors and Agency Co. Ltd.*, 55 C.L.R. 483 (High Court of Australia, 1936), a moratorium case placing in a conflict of laws situation the whole emphasis on the *lex rei sitae* of the mortgagor.

¹² In *Washburn Crosby Co. v. Northern Pac. Ry. Co.*, 16 F.(2d) 76 (C.C.A. 8th, 1926), Stone, C.J., gives an able analysis, with an eye to the currency problem of the semi-official United States-Canada railroad agreement on freight charges in through traffic.

A general rule may be asserted to the effect that commissions and similar participations ordinarily run in the same monetary terms as does the principal transaction. *Reichswirtschaftsgericht* (German), Sept. 9, 1921, *J.W.* 1922, 744. But in *King Line Ltd. v. Westralian Farmers Ltd.*, 43 Lloyds L.R. 378 (1932), the House of Lords interpreted a commission promised by the English Line (plaintiff) to the defendant on the total freight, as an Australian-pound commission although the freight charges were paid in sterling. The awkward language of the charter-party was responsible for this outcome. See the dissenting opinion of Lord Scrutton, disagreeing with his colleagues of the Court of Appeal (reversed by the House of Lords), 48 T.L.R. 158 (1931). There may be mentioned a holding of the English Court of Appeal in *Bain v. Field & Co.*, 5 Lloyds L. Rep. 16 (1920). The court ruled that when a seller quotes a price in an ambiguous currency (dollars) he is supposed to mean the currency of his own country (Canadian dollars).

"pound" makes it clear that the English pound is referred to.¹³ In the interpretation of wills and settlements, the emphasis has always been on the domicile of the testator or promisor rather than on the place of payment.¹⁴

Sometimes the money of contract is uncertain although no ambiguous currency term is employed by the parties. Thus, before the World War, German parties had bought and sold securities in the London and New York stock markets on a large scale through German brokers. After the war considerable litigation arose because of doubt whether the relationships between the German parties were to be settled on a sterling or dollar or mark basis. A sound solution of the controversies would have relied primarily on the currency used by the broker in conducting the customer's account, provided the course of accounting were accepted or acquiesced in by the customer. But this suggestive point of view was overlooked by the *Reichsgericht* which thus arrived at unsatisfactory decisions.¹⁵ Another problem was raised by German

¹³ *De Bueger v. Ballantine & Co.*, [1938] A.C. 452 (Privy Council, 1938); a New Zealand case. See also *Lansdowne v. Lansdowne*, 2 Bligh 60, 4 Eng. Rep. 250 (H. of L., 1820), and *Auckland Corp. v. Alliance Insurance Co.*, [1937] A.C. 587 at 603 (Privy Council, 1937) ("sterling, that is English currency"). In regard to an entirely South African contract the word "sterling" was deemed meaningless. *Fisher, Simmons & Rodney (Pty.) Ltd. v. Munesari*, 53 Natal L.R. 77 (Sup. Ct. of S. Afr., 1932). This is unconvincing.

To be sure, in Irish instruments of the eighteenth and the early nineteenth centuries the phrase "sterling, current and lawful money of Great Britain" did frequently mean Irish currency. The leading case is *Neville v. Ponsonby*, 1 Ir. Law Rep. 204 (Exchequer Ireland, 1839); see also *Coates v. Cotter*, 1 Crawford & Dix 66 (M.R. Ireland, 1837), *Galagher v. Mullins*, 1 Jebb & Symes 441 (Q.B. Ireland, 1839), *Whelan v. Annesley*, 4 Ir. Law Rep. 334 (Common Pleas Ireland, 1842), *The Queen v. The Justices of Mayo*, 7 Ir. Comm. Law Rep. 234 (Q.B. Ireland, 1857). Same as to bills of exchange made abroad *Pickardo v. Machado*, 4 B. & C. 886, 107 Eng. Rep. 1288 (K.B., 1825). Contrariwise, in *Cope v. Cope*, 15 Sim. 118, 60 Eng. Rep. 562 (Vice Chancellor, 1846), the Court awarded English pounds on a marriage settlement couched in terms of "1,000 sterling lawful money of Ireland". These peculiarities of Irish draftsmanship or interpretation cannot be generalized. *Bushby v. Camac*, Fed. Cas. 2,226 (C.C. E.D. Pa., 1822), is a pertinent American case. On no account is the expression "sterling" indicative of a gold clause. *Supra*, p. 315, n. 6.

¹⁴ *Wallis v. Brightwell*, 2 P. Wms. 88, 24 Eng. Rep. 652 (Ch., 1722); *Saunders v. Drake*, 2 Atk. 465, 26 Eng. Rep. 681 (Ch., 1742) (Jamaica pounds); *Pierson v. Garnet*, 2 Bro. C.C. 38, 29 Eng. Rep. 20 (Ch., 1786); *Holmes v. Holmes*, 1 Russ. & M. 660, 39 Eng. Rep. 253 (Master of the Rolls, 1830); *Macrae v. Goodman*, 5 Moore 315, 13 Eng. Rep. 512 (Privy Council, 1846) (Dutch or Colonial Dutch currency).

¹⁵ The main cases are *Reichsgericht*, Dec. 15, 1920, *R.G.Z.* 101, 122; March 25, 1922, *ibid.* 104, 223; July 11, 1923, *ibid.* 108, 191. They are commented on by the present writer in *J.W.* 1921, 891; *ibid.*, 1922, 1721; *ibid.*, 1924, 181. See also *infra*, sec. 36 at n. 29.

life insurance companies which before the war had sold policies running in Swiss and other non-German currencies but had invested their insurance reserves, in accordance with German law, in German securities and mortgages. After the breakdown of the mark, the companies attempted to have the policies treated as mark contracts because of the alleged tie-up of the insured amounts with the reserve funds. But the contention of the companies was firmly refuted by the *Reichsgericht* which, despite the difficult situation of the companies, held them liable to make payment in the foreign currency.¹⁶

The American reports do not offer many comparable cases. A somewhat puzzling Pennsylvania case of 1868 may, however, be mentioned. A purchase price explicitly stated in dollars and found by the court to be payable in London, was deemed by the court to be a sterling price, regardless of the language of the contract and of the common conduct of the parties.¹⁷ The decision amounted virtually to a revaluation on a gold (sterling) basis, not authorized by law.

II. Money of Measure

A phenomenon which makes for considerable obscurity in monetary agreements is the contractual reference to a sum which does not fix the amount of the debt, but merely serves as a calculating factor or "measure" in its determination. There is a wide variety of such clauses. In the majority of instances the debtor promises a seemingly definite amount of his national money. For instance, a German debtor promises to pay 1,000 marks on the basis of \$1=4.20 marks¹⁸ or an Italian debtor promises to pay 1,000 lire on the basis of £1=92 lire.¹⁹ In such situations we are confronted with mark debts

¹⁶ *Reichsgericht*, July 6, 1923, *R.G.Z.* 107, 111; March 25, 1924, *J.W.*, 1924, 1364; June 17, 1924, *J.W.* 1924, 1366. For a comprehensive study of the problem, see Wahle, *Der Einfluss Diktierter Kurse auf Laufende Lebensversicherungsverträge* (Vienna, 1932).

¹⁷ *Benners v. Clemens*, 58 Pa. 24 (1868).

¹⁸ This ratio was frequently used in Germany during the inflation. (The exact pre-war ratio was 4.197.) See, e.g., *Reichsgericht*, Dec. 14, 1934, *R.G.Z.* 146, 1.

¹⁹ See Italian Court of Cassation, Jan. 10, 1936, *R.D. Comm.*, 1936 II 386; Appellate Court of Milan, Nov. 26, 1937, *Foro Italiano*, 1938 I 273. In the first case the guaranty was qualified by a "tolerance" clause, *supra*, p. 333. Another example is furnished by the English Government's purchase of rice from Indian exporters during the World War. The sellers were promised payment in pounds, but on a definite ratio to the rupee "fluctuations being on buyer's account". *Royal Commission v. Bulloch Bros.*, 13 Lloyd's L. Rep. 418 (C.A., 1922).

or lire debts, respectively, the amount of which is in fact uncertain, being dependent upon the rate of exchange of another currency which is presumably considered more stable by the parties. Such clauses practically guaranteeing a definite rate of exchange (*clauses de garantie de change*)²⁰ do not imply a tacit gold clause.²¹ Under French law the clauses are void except if embodied in "international" contracts²² and even in that area their effect has been reduced by restrictive interpretation.²³

In another set of cases the obligor promises an amount of foreign currency measured at a fixed ratio to his national money. Thus the Canadian Alberta and Great Waterways Railroad Co. had floated a bond loan in London, the coupons of which contained the following stipulation: "The company will pay to bearer \$..... of lawful money of Canada at the fixed rate of exchange of 4.86 $\frac{2}{3}$ for the pound sterling . . . in London, England, being half yearly interest at the rate of 5% *per annum*." (The bond was for 1,000 Canadian dollars.) Contrary to what appeared on its face, this was a sterling coupon rather than a dollar coupon and was so held by the Alberta Supreme Court, Appellate Division,²⁴ which dismissed the claim of a holder for 25 Canadian dollars, then at a premium over sterling money. The "foreign-currency" character of the debt, indicated by the English place of payment, was "disguised" in this case, the dollar serving merely as "money of measure".²⁵ In like cases, there is no

²⁰ In the case of *Travellers Bank v. Patenôtre*, in 1932, the latter was given a *guarantee* by the American Bank (probably through its French branch) securing him an equivalent of 25.325 francs for each dollar in certain periodical dollar payments due to Mr. Patenôtre. The fact situation was peculiar in that the guarantee was not undertaken by the debtor, but by a third person. Appellate Court of Paris, Oct. 26, 1933, *J.D. Int.*, 1933, 943. See *supra*, p. 394, n. 68.

²¹ *Supra*, p. 317.

²² *Supra*, p. 339.

²³ The Appellate Court of Douai, Oct. 21, 1924, *Gazette du Palais*, 1924 II 600, held the guarantee good only in respect to unimportant (*sic*) fluctuations of the market. The creditor was an English corporation which wanted to secure the equivalent of the francs amount in terms of the pound sterling.

²⁴ *Brown v. Alberta and Great Waterways Railway Co.*, 59 D.L.R. 520 (1921).

²⁵ A kindred case is *Pennsylvania Ry. Co. v. Cameron*, 280 Pa. 458, 124 Atl. 638 (1924), where an Australian bill of lading provided for a £ freight, payable in Philadelphia at the rate of \$4.8666. This was a disguised dollar freight. *Booth and Co. v. Canadian Government Merchant Marine Ltd.*, 63 F.(2d) 240 (C.C.A. 2d, 1933), though presenting

"local payment rule" in favor of the debtor, the national money being neither *in obligatione* nor *in solutione*.²⁶

The situation becomes more involved where the foreign currency due is payable outside the territory of origin of the currency. Before the war a German mortgagor promised his mortgagee, a Swiss Bank, to pay back [in Germany] the 65,000 marks received "payment of interest and principal to be made at the fixed ratio of 123.50 Swiss francs for each 100 marks" [which was the pre-war rate of exchange]. This again amounts to a disguised foreign currency debt, marks being the "money of measure" and Swiss francs the "money of contract". Still a different feature is presented in that the German marks, because of the "local-payment" rule, were at the same time the "money of payment" to be calculated at the rate of exchange existing at the time of payment.²⁷ (Generally speaking, there are three phases in the mental process: determination of the money of measure; of the money of contract; and of the money of payment.) In another case a loan contract, on its face phrased in a definite sum of marks, between a Dutch creditor and a German debtor contained the following provision, ostensibly of an ancillary nature: "All payments are to be made in Dutch guilders at the rate of exchange existing at the time of the loan."²⁸ Here a disguised guilder debt, payable in Germany, was presented, further obscured by the substitution, for a numerically stated ratio, of the reference to the rate which existed at the time of contracting.

"Money of measure" was frequently used in international insurance during and shortly after the World War because

some comparable features, concerned a sterling-dollar option, with the choice in the debtor, the freight being stipulated in sterling "or equivalent", namely (under the circumstances), dollars.

²⁶ The ruling of *Société des Hôtels Le Touquet v. Cummings*, [1922] 1 K.B. 451 (C.A., 1921), discussed *supra*, p. 431, n. 36, does not apply to the money of measure. *Ivar an Christensen v. Furness*, 12 Lloyd's L. Rep. 288 at 291 (K.B., 1922).

²⁷ *Reichsgericht*, Nov. 29, 1920, *J.W.* 1921, 231. Another remarkable instance is the Danish Colonial Lottery of 1932, floated in France, the face amount of the tickets being expressed in French francs in the following clause: "All lots are payable in Danish crowns at the pre-war ratio of 100 francs = 72 crowns, regardless of the actual value of the franc." See Seignol, *L'Option de Change et l'Option de Place* (1935) 29. The "stabilized" franc and the reference to the pre-war ratio may have sounded delightful to the ears of the French public; but the pre-war ratio had an entirely different meaning in 1932, when the Danish crown, too, had depreciated.

²⁸ *Reichsgericht*, June 27, 1923, *J.W.* 1924, 173.

the insured often conducted his business under another currency than that of the insurer. Hence the insured interest was sometimes indicated in terms of the insured's currency, whereas the amount of insurance ran in terms of the insurer's currency.²⁹ For instance, in an open policy sold by a German company to a Norwegian firm it was provided that the insurance for each shipment should not exceed 3,000,000 marks. When the insured had declared the value in Norwegian crowns and the goods were lost the company offered 3,000,000 depreciated marks. The *Reichsgericht*, however, held that the computation of the maximum amount to be paid was to be made by converting in crowns at the rate of exchange prevailing at the beginning of each insurance period; the court rejected the defense of the insurers that they could not be expected to take over the currency risk, which is uncoverable by re-assurance.³⁰ In that case no definite ratio between the two currencies involved was provided for by the contract. Such a ratio, however, was ordinarily incorporated into foreign war insurances by English companies.³¹ They probably thought to stabilize their obligations, but were mistaken. In a French case an English reassurance company had sold to a French ceding insurer, a reassurance policy on £5,000 "at a ratio of 10,000 francs for £352" which was then probably in accord with existing exchange conditions. When the event insured against occurred, the insured was indemnified by the ceding insurer in francs which had meanwhile depreciated. When subsequently the franc recovered, the ceding insurer sued the English company in a French court for pounds at the agreed

²⁹ See *Poulsen & Can v. Massey*, 1 Lloyds L. Rep. 497 (K.B., 1919); *McIntyre v. Krutwig*, 10 *ibid.* 430 (K.B., 1922); *Ivar an Christensen v. Furness*, 12 *ibid.* 288 (K.B., 1922). An early precursor is *Phillips v. Insurance Co. of Philadelphia*, Fed. Cas. No. 11,102 (C.C.D. Pa., prior to 1822), involving a dollar insurance with the rupee as money of measure. Identity of both contractual currency terms existed in the reinsurance cases *Versicherungs-und Transport A. G. Daugava v. Henderson*, 49 Lloyds L. Rep. 252 (C.A., 1934), and *Reichsgericht*, April 22, 1925, J.W. 1926, 1970. In the first case the point was merely a proper application of the Anglo-American conversion rule, the *lats* (Latvian money) contracted for to be converted into pounds at the rate of the date when the ceding insurer paid the original insured. In the German case the ceding German insurer had paid Norwegian crowns, but was justly granted only depreciated marks, as contracted for. See also cases cited n. 32-34 and sec. 35, n. 2 and 15.

³⁰ Judgment of April 16, 1924, R.G.Z. 108, 153.

³¹ According to Appellate Court of Paris, June 25, 1926, 14 *Revue de Droit Maritime Comparé* 432, this was true for the majority of English policies. The Court refers to the provisions fixing a franc-sterling ratio as "exchange clauses".

rate. The court held for the plaintiff considering that his profit, in itself contrary to insurance principles, was the result of the fluctuations of the rate of exchange rather than the result of the insurance which had been definitely settled through the indemnification of the original insured.³²

While in this situation sterling was owed by the English company, in the American case *Marine Insurance Co., Ltd. v. Craig McLanahan*,³³ a dollar debt of an English company was presented. An American had insured his barge with the latter under a policy with a dollar face amount and prescribing "all claims to be settled at \$4.75 to the £". Premiums were paid in £ according to this ratio. Upon total loss of the barge, the company offered payment of the face amount of the policy in depreciated pounds sterling, but it was held liable to pay the face amount. The House of Lords, however, in a similar case dismissed the suit against the English company holding the ratio agreed upon not applicable to the face amount of the policy, which was expressed in pounds sterling.³⁴ The opinion is silent with regard to premiums. The presence of the rate agreement was explained by the Court merely on the ground that "there might be certain general average claims which were made in dollars and which from their nature might require to be translated into currency", but apart from the arbitrary and insignificant nature of this ref-

³² *Cour de Cassation*, April 23, 1928, *D.H.* 1928, 302. In a case where the ceding insurer had made an indemnification contract with the assuming re-insurer in terms of marks, but had contracted with the original insured in terms of a non-German currency the *Reichsgericht*, April 22, 1925, *J.W.* 1926, 1970, accurately held that reinsurance is not supposed to cover the risk of fluctuating rates of exchange. No provision for a ratio between the two currencies involved was present in this case. For a discussion of currency problems of reinsurance see Hagen, "*Rückversicherung und Währungssturz*", in *Festgabe für Alfred Manes* (1927) 204.

³³ 290 Fed. 685 (C.C.A. 4th, 1923).

³⁴ *Howard Houlder and Partners v. Union Marine Insurance Co.*, 38 T.L.R. 515 (H. of L., 1922); affirming 37 T.L.R. 579 (C.A., 1921). No more convincing is *Larsen v. Anglo-American Oil Co.*, 20 Lloyds L.R. 67 (1924), where the House of Lords, reversing the Court of Appeal, held an English insurance policy sold to a Norwegian freighter in terms of Norwegian crowns, to be a £ policy primarily because the premiums were fixed in £. The crowns had appreciated considerably since the time of contracting. A French counterpart is Appellate Court of Paris, April 15, 1926, 14 *Revue de Droit Maritime Comparé* 418, where a policy of a French company, phrased in terms of francs and dollars, was held, despite strong indications to the contrary, a franc policy, through an interpretation which the annotator of the case, Mr. Morillot, justly characterizes as hazardous.

erence it is not plausible that indemnification for total loss should be computable on a lower basis than indemnification for partial loss in the case of general averages.

Generally judicial pronouncements on this important matter have not been very edifying³⁵ except that the German courts showed a remarkably good record. But the English insurance cases are disappointing. To be sure, draftsmanship of the "money of measure" device is sometimes so poor as to make a congruent and at the same time sensible interpretation almost impossible.³⁶

SECTION 35

MULTIPLE CURRENCY CLAUSES¹

I. "Multiple Currency" and "Multiple Collection" Clauses (options de change and options de place)

Bond loans designed to be floated in different countries customarily provide that the prospective buyer of a bond may receive interest and principal in his own country and in his own money. Obviously financing will be considerably eased by this device which is sometimes also employed in the foreign business of life insurance companies, especially for life annuities,² and in some other situations.³ Numerous forms

³⁵ A Czechoslovakian seller and a Viennese buyer had contracted in terms of Czechocrowns to be paid in Austrian crowns at a ratio of 1:6½ "promptly without discount at the *Wiener Bankverein*" (a Viennese bank). Subsequent to the making of the contract the Austrian crown suffered a further depreciation. The buyer not having paid in time was held liable by the Supreme Court of Czechoslovakia, June 5, 1923, 4 *Auslandsrecht* 320, to pay the amount of Czechocrowns, stipulated as a mere "money of measure". He was thus also subjected to the loss that arose, through depreciation, before maturity.

³⁶ See *Royal Trust Co. v. Oak Bay*, [1934] 4 D.L.R. 697 (British Columbia Sup. Ct., 1934), discussed *infra*, sec. 35, n. 31; *Modiano Brothers & Son v. F. D. Bailey & Sons, Ltd.*, 47 *Lloyds L.R.* 134 (K.B., 1933), discussed *supra*, p. 323, n. 38; *Royal Commission v. Bulloch Bros.*, 13 *Lloyds L.R.* 418 (C.A., 1922); Appellate Court of Bordeaux, May 23, 1921, D.P. 1923 II 6.

¹ See Nussbaum, "Multiple currency and index clauses", (1936) 84 *U. of Pa. L.R.* 569; Seignol, *L'Option de Change et L'Option de Place* (1935) offering ample French material; Pictet, "L'Option de change", in (1935) 54 *Zeitschrift für Schweizerisches Recht* 310; 3 Neumeyer, *Internationales Verwaltungsrecht* part 2 III (1930) 176.

² Instances in Appellate Court of Berlin (*Kammergericht*), March 13, 1926, *Juristische Rundschau für Privatversicherung*, 1926, 117 (marks or, in England, pounds sterling) and in the cases cited *infra*, p. 450, n. 15 and p. 460, n. 56.

³ For instance, in maritime freight contracts. See *Modiano Brothers & Son v. F. D. Bailey & Sons, Ltd.*, 47 *Lloyds L.R.* 134 (K.B., 1933).

and shadings of the clause have been elaborated, the paramount distinction being the following: (I) Either one of the currencies promised is basic, which practically means that one of the places mentioned in the bond (or other contract)⁴ is basic also (namely the place where that currency is the common money), or (II) the various currencies and the places of payment are coordinated to each other. In the first case, the amount due is fixed exclusively in the basic currency and is payable within the territory of that currency, the equivalent of the basic amount at the current rate of exchange being collectible in the other places mentioned in the bond, in their local currency. In the second case, a definite amount is provided in terms of each currency involved, independent of the reciprocal fluctuations of the rate of exchange. The French contrast the two situations as *option de place* and *option de change*, but this nomenclature, although widely received even outside of France,⁵ is not very apt since in the second situation, there is, contrary to its denomination, no "change"; there is in fact a distinctive absence of a rate of exchange.⁶ American legal practice has in the first place developed the contrast of "payable" and "collectible" amounts. In the case of the so-called *option de place* there is one place of payment, the others being only places of "collection";⁷ in the case of the *option de change* all the places mentioned are places of "payment". Another American contribution to the pertinent terminology is the expression "multiple currency"

⁴ For the sake of convenience only bonds will be referred to in the further discussion.

⁵ For instance by the Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung*, 54 II 257 at 276, *J.D.Int.* 1929, 497 at 505.

⁶ In Nussbaum, *Das Geld* (1925) 203, the term *alternative Währungsklausel* was suggested for *option de change*; it was adopted by *Reichsgericht*, Nov. 14, 1929, *R.G.Z.* 126, 196; Appellate Court of Cologne, Sept. 13, 1935, *J.W.* 1936, 203; Supreme Court of Austria, Dec. 17, 1930, *Die Rechtsprechung* 1931, 1 (referring to the author). It may, however, be admitted that the term is somewhat inaccurate.

⁷ The American concept of "collectible", as opposed to "payable", was used by the Appellate Court of the Hague in the case of the "Royal Dutch", *supra*, p. 392, judgment of Jan. 14, 1935, *Nederlandsche Jurisprudentie*, 1935, 119, and by the Court (*Landgericht*) of Berlin, May 15, 1935, Sack and Meyer-Collings, *Geld- und Valutaklausel in Deutscher und Niederländischer Gerichtspraxis* (1937) 167; it was misunderstood by the *Tribunal civil de la Seine*, July 23, 1936, *Sirey* 1938 II 25, to mean merely another aspect of "payable".

The contrast of "payable" with "collectible" is also used in the American law of guaranty, see Richardson, *Outline of the Law of Suretyship and Guaranty* (2d ed., 1929) 7, but there is little connection between that matter and the present subject.

clause which is becoming customary in this country, and is unobjectionable if confined to the *option de change*;⁸ the name of "multiple collection clause" resting on the technical significance of "collectible" may be suggested as an appropriate designation for the alternative (*option de place*).

Under either clause the debtor is legally obligated to procure the money for the holder at the place and in the currency indicated in the contract.⁹ Either clause may be sufficient, under the local law, to give the courts of the place of payment or collection,¹⁰ jurisdiction. Again there are cases which subject the bond wholly or partly to the law of the place selected by the holder.¹¹ Particular significance was conferred upon that place also by the Dutch *Hooge Raad* in the case of the "Royal Dutch".¹²

When the bond is issued, there is, of course, financially no actual disparity between the effects of a "currency clause" and of a "collection clause".¹³ Nevertheless, the innate difference between the two clauses is considerable. Their divergence

⁸ However, there may be a multiple currency clause with no multiplicity of "places". In the frontier districts of Holland, real estate transactions have apparently sometimes been made with a provision allowing payment alternatively in Dutch money or in the money of the neighboring country, without providing for a foreign place of payment or collection. Court of Maastricht, Feb. 15, 1923, *Weekblad van het Recht*, 1925 n. 11367, and cases collected by Levenbach, *De Spanning van de Kontraktsband* (1923) 261. See also *Booth & Co. v. Canadian Government*, *supra*, p. 443, n. 25, and the cases cited *infra*, p. 456, n. 34.

⁹ Even where no local paying agency was established, Appellate Court of Paris, Nov. 25, 1926, *J.D.Int.* 1927, 700, or the existing agency had been discontinued, *infra*, n. 17.

Multiple currency clauses probably do not come under the Joint Resolution, *infra*, p. 453.

¹⁰ Swiss Federal Tribunal, Nov. 4, 1926, *Amtliche Sammlung* 52 III 165 and Dec. 19, 1927, *ibid.* 53 III 196; March 28, 1930, *ibid.* 56 I 237, where a dictum suggests that stipulation by a foreign debtor government of a Swiss place of collection may give jurisdiction to the Swiss courts, overcoming the immunity of the foreign government. See also dictum in Tribunal civil of Antwerp, Jan. 5, 1935, *Bull. I.I.I.* 32, 93.

As to the conversion of the foreign money selected by the bondholder into the *moneta forti*, the rules discussed *supra*, sec. 33 I and II apply. See Appellate Court of Florence, July 13, 1937, *Foro Italiano*, 1937 I 1124, referring to the day of payment.

¹¹ *Supra*, p. 383, n. 14.

¹² *Supra*, p. 392.

¹³ In *Rhokana Corp. Ltd. v. Inland Revenue Commissioners*, [1938] A.C. 380 (H. of L., 1938), the income tax at the source on an English multiple currency bond, payable in London, New York, and Amsterdam, was computed on the sterling amount only, the court considering the rights to receive dollars or guilders ancillary. The view is explicable by the technical difficulties of collecting the tax at the source; it would be accurate in substance if applied to multiple collection clauses.

will develop as soon as the equilibrium existing between currencies at the time of issuance is disturbed and it may eventually upset the whole financial structure of the transaction. This happened frequently after the World War. Wherever there was an option clause, creditors would interpret it as a "multiple currency clause" and present the bond or coupon at the place having the best currency. The debtors, of course, evinced the opposite tendency. Debtors domiciled in a territory of depreciated currency, were extremely reluctant to pay more than the amount promised in terms of their national currency. Every imaginable argument, *pro* and *con*, was advanced in the widespread ensuing litigation. It is this group of cases which furnished the closest analogy to the gold-clause disputes.

On some points the courts were more or less unanimous. The debtor companies asserted repeatedly that the equation of sums in foreign money and sums in the debtor's national money in the multiple currency clauses only purported to inform the foreign holder of the relative value of the various currencies as of the time of issuance. For instance, the Austrian railway companies, in the "Austrian Coupon Suits" ¹⁴ advanced the argument that if a coupon promised "5 Austrian florins=3 thaler 10 groschen=12.50 francs" (in some cases "or" was used instead of the sign of equality) that merely constituted a more or less interesting narrative, without legal significance, and that only Austrian crowns or their present equivalent were promised. This type of defense was held good by the Civil Tribunal Seine ¹⁵ in the case of a life insurance policy issued by a French company to a Swede, the policy being signed in France and Sweden, and calling for insurance payment of "francs 3000=kronors 2.160". However, this decision stands alone.¹⁶ Frequently the companies invoked

¹⁴ *Supra*, p. 141.

¹⁵ Judgment of Dec. 13, 1926, *J.D.Int.* 1927, 1035.

¹⁶ The *Reichsgericht*, Nov. 22, 1928, 28 *Bankarchiv* 376, was confronted with a mortgage bond issued Jan. 1, 1921, at 5,000 marks, bearing the inscription "5000 marks—6250 francs—250 £, payable in Berlin". In January 1921, the £ was equal to about 250 marks, the parity being 20.50. In view of the fact, striking indeed, that the bonds were traded in at their mark value, that is, at about a *twelfth* of the sterling face amount, the court concluded that the reference to francs and pounds, reflecting the pre-war ratio, was considered as legally insignificant by the business community. The findings in the judgment on this very uncommon fact situation are not sufficiently detailed to allow a substantial appreciation. The "narration" theory was rejected in the

the universal rule giving the right of choice in alternative obligations to the debtor, but this argument was rejected without exception by the courts. They all recognized that the purpose of the multiple currency clause was the offering of appropriate facilities to the prospective bondholders (or other investors).¹⁷ The trouble with this solution is that all the bondholders, in whichever country the bond was subscribed, will present the bond and the coupons for payment in that eligible country which offers the most favorable rate of exchange; and they can do so because the bonds are almost invariably payable to bearer, or, if not, are indorsable in blank, granting every holder the same rights and facilities. Consequently the debtor companies repeatedly tried to break up the homogenous loan, i.e., to discriminate between different bondholders, by interpreting the multiple currency clause to mean that the sound currency promised (for instance, Swiss francs) could only be claimed by holders of bonds originally subscribed in the country of that currency (in the above instance: in Switzerland). This defense, however, was not accepted by the courts, the French Court of Cassation duly stressing the "indivisibility" of the loan.¹⁸ The *Reichsgericht* at first denied German bondholders the right to receive Swiss francs on a pre-war loan which was payable in

Austrian Coupon Cases, *supra*, p. 141, n. 25, and by the Supreme Court of Austria, Dec. 17, 1930, *Die Rechtsprechung*, 1931, 1, referring to this author.

¹⁷ *Cour de Cassation*, July 17, 1929, *J.D.Int.* 1929, 1075, in re *Banco El Hogar Argentino*, and numerous decisions of the Appellate Court of Paris, e.g., Nov. 25, 1926, *J.D.Int.* 1927, 700; Jan. 19, 1928, *ibid.*, 1928, 671; *Reichsgericht*, July 1, 1926, *J.W.* 1926, 2675; Supreme Court of Argentina, Sept. 7, 1923, *Fallos de la Suprema Corte Nacional* 138, 402; Court of Cassation of the Libanon, June 20, 1928, *Sirey* 1929 IV 1; Appellate Court of Amsterdam, Jan. 21, 1927, *Weekblad van het Recht*, no. 11633, *J.D.Int.* 1927, 770; Appellate Court of Florence, July 13, 1937, *Foro Italiano*, 1937 I 1124.

The *Banco El Hogar Argentino* had promised in its bonds to pay francs in Paris and "gold pesos" in Buenos Aires. When the franc began to depreciate the company discontinued its paying service instituted in Buenos Aires. Of course, this attempt to create a *fait accompli* failed. See also Lagarde, *L'Emission des Titres en France*, etc. (thesis Poitiers, 1926) 205. The Austrian Supreme Court, June 1, 1937, *Bull. I.I.I.* 37, 245, rightly held the debtor liable to appoint new paying agents in the countries mentioned in the bonds after the original agents had discontinued their services.

¹⁸ Judgment of June 19, 1933, *J.D.Int.* 1934, 939. Similarly *McAdoo v. Southern Pacific R. Co.*, 10 F. Supp. 953 (D.C. N.D. Cal., 1935); Austrian Supreme Court, June 1, 1937, *Bull. I.I.I.* 37, 245, and Swiss Federal Tribunal, May 23, 1928, *Amliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497 (in the case of the *Crédit Foncier Franco-Canadien*).

Germany in marks, and in Switzerland in Swiss francs,¹⁹ but this ruling met with keen criticism²⁰ and was soon abandoned by the Court.²¹

The breaking up of the loan, through an annihilation of the "bearer" clause,²² however, was also sought along another line of argument, namely on the ground of statutory gold clause abrogation. In this country especially it was argued that the Joint Resolution affected bonds issued under a multiple currency clause by American debtors. For instance, when a coupon called for the payment of \$25 in New York or £5 in London or 62 guilders in Amsterdam, holders of bonds subscribed in the United States must be contented, under this theory, with dollars and are divested of the rights flowing from the multiple currency clause lest the "dollar-for-dollar" rule of the Joint Resolution be violated by bondholders subject to American jurisdiction. Readily adopting this doctrine, and probably acting under a collective agreement, American corporations obligated under multiple currency clauses decided to make payment of foreign currency (Dutch guilders) dependent upon the signing of, or even swearing to an elaborate affidavit, by the bondholder. Broadly speaking, the affiant had to declare, among other things, that at the time of the enactment of the Joint Resolution, the bond was held by a non-resident and that the presenting holder was now a non-resident and had been so during the preceding six months.²³

¹⁹ Judgment of Dec. 21, 1925, *J.W.* 1926, 1320.

²⁰ See Nussbaum, *J.W.* 1926, 1320 (annotation) and Springer, (1926) 25 *Bankarchiv* 291.

²¹ Judgment of July 1, 1926, *J.W.* 1926, 2675; Dec. 22, 1927, 27 *Bankarchiv* 162.

²² Or of the blank endorsements.

²³ For details, see Nussbaum, "Multiple currency and index clauses", (1936) 84 *U. of Pa. L.R.* 569 at 586, 587. A similar attempt had previously been made by the *Crédit Foncier Franco-Canadien*, but had to be given up as a result of contrary judicial decisions; see French *Cour de Cassation*, June 3, 1930, *J.D.Int.* 1931, 103, and Swiss Federal Tribunal, May 23, 1928, *Amlicke Sammlung* 54 II 257, *J.D.Int.* 1929, 497. On the failure of the *Reichsgericht's* attempt to discriminate among the holders of German gold-dollar bonds, see *supra*, p. 394. In truth, unified loans have been broken up, on the basis of affidavits required from the holders, by acts of legislation. Discriminatory measures of this type were taken, for instance, by the Spanish government in regard to its loans, in 1898, 1901 and 1905, and by the Portuguese government in 1916, Seignol, *L'Option de Change et L'Option de Place* (1935) 251 and 247. Other instances are furnished by the Peace Treaties of St. Germain, art. 203, annex par. 2, and of Trianon, art. 186, annex par. 2, providing for a distribution of the bonded Austrian public debt among the "successor states". See Feilchenfeld, *Public Debts and State*

However, the Joint Resolution only refers to gold clauses; the matter of multiple currency clauses presenting entirely different economic and political problems, was never envisaged by Congress.²⁴ Nor does the Joint Resolution offer any ground for destroying bearer clauses and discriminating against American bondholders. This is in accord with the sounder American view.²⁵ It has also been held by Belgian courts that statutory gold clause abrogation does not affect multiple currency clauses.²⁶

Succession (1931) 500, 842, 880. The method used was to stamp the bonds. (The repercussion of those measures on foreign markets is illustrated by Appellate Court of Jena, judgment of Nov. 3, 1921, 22 *Bankarchiv* 69.) Under the present German exchange control, certain bearer securities, if held by foreigners, are exempt, as to interest or dividends, from the transfer prohibition. In order to have the money transferred, the foreigner must make an affidavit stating his quality as a foreigner and certain other facts. Basic is the German law of Feb. 4, 1935, sec. 19(2), *R.G.Bl.* 1935 I 105. *Infra*, p. 477, n. 5.

²⁴ This has been more fully developed by this writer in the article cited in the preceding note at p. 573.

²⁵ *Anglo-Continental Treuhand A.-G. v. St. Louis Southwestern Railway Co.*, 81 F.(2d) 11, (C.C.A. 2d, 1936), opinion written by Judge Learned Hand, *certiorari denied* 298 U.S. 655 (1936); *McAdoo v. Southern Pac. R. Co.*, 10 F. Supp. 953 (N.D. Cal., 1935), reversed, for other reasons, 82 F.(2d) 121 (1936). *Contra: City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. 634, 280 N.Y. Supp. 494, analyzed in the writer's article cited *supra*, n. 23; *Zürich General Accident and Liability Ins. Co. v. Lackawanna Steel Co.*, 164 Misc. 498, 299 N.Y. Supp. 862 (1937), *aff'd*, 254 App. Div. 839, 6 N.Y. Supp. (2d) 139 (1938). In the latter two cases the point is made that one alternative of the multiple-currency clause at bar was to pay gold-dollars in New York and that for this reason the bonds came under the Joint Resolution. Still the only conclusion to be drawn from this fact is that the gold dollars became plain dollars. The alternative of payment in guilders remained unaffected, just as if there had been no gold dollar clause from the beginning. Placing the bondholder in a worse position as to the guildler clause merely because he had been originally granted additional privilege through the gold clause, is a preposterous result. It is all the more unacceptable because the argument of the Court as recognized in the Lackawanna case, deprives also foreign bondholders of their contractual right to be paid the stipulated amount of foreign currency. Payment of "dollar for dollar" rather than "dollar for guildler" (or any other foreign money) is intended by the Joint Resolution (see *supra*, p. 358, n. 6). In *Anglo-Continental Treuhand v. Southern Pac. Co.*, 165 Misc. 562, 299 N.Y. Supp. 859 (1936), the Court felt "constrained" to follow the decision of the Appellate Division.

Recently the Eighth Circuit Court of Appeals has adopted the reasoning of the Lackawanna case, adding the argument that by virtue of the multiple currency clause the stipulated amounts of foreign currency "were based upon the gold dollar". *Guaranty Trust Co. v. Hemwood*, 98 F.(2d) 160 (1938); see also *Chemical Bank & Trust Co. v. Hemwood*, 98 F.(2d) 179 (1938). However, in a multiple currency clause, as distinguished from a multiple collection clause, the amounts alternatively promised are legally independent of each other, *infra*, p. 461. See on similar French theories, *infra*, p. 463, n. 70.

²⁶ Civil Tribunal of Brussels, April 7, 1936, *Bull. I.I.I.* 35, 130,

The formulae used by the debtor corporations in shaping multiple currency clauses, also require scrutiny. Debtors will sometimes defeat the bondholders by convincing the court that there exists only a "multiple-collection clause", based upon an amount in a depreciated currency. Courts should not be too easily satisfied of this. According to a well-known principle of law the party submitting a form contract to the public should make its meaning clear, failing which, doubts arising because of unsatisfactory draftsmanship will be settled adversely to it.²⁷ This is particularly true where special clauses have been elaborated by the issuer in order to attract groups of investors who otherwise would not have been reached. When a corporation appeals to foreign capital markets and intends to make payment in the local currency only on the basis of the corporation's national currency, hence through a multiple collection clause, there is a convenient method of avoiding any doubts. The corporation may designate payment in foreign currency as merely an aspect of the debt in the national currency, by giving definite figures only in terms of its national currency and stating that the amount in foreign currency to be paid will be determined by the current²⁸ rate of exchange. This has been done in numerous cases.²⁹ Where it has not been done, a multiple currency clause should ordinarily³⁰ be deemed to exist.

A "fixed" rate of exchange, involving a "money of measure" does not necessarily imply a multiple currency or a mul-

Commercial Tribunal of Brussels, Dec. 17, 1936, *ibid.* 37, 81; full text in Plesch *Recueil d'Arrêts et de Consultations sur la Clause-Or* (1937) 67, 72.

²⁷ See, in general, 3 Williston, *Contracts* (rev. ed., 1936), sec. 621; and particularly as to the problem before us, Swiss Federal Tribunal, in the case of the *Crédit Foncier Franco-Canadien*, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497 at 502 and Mixed Appellate Court of Alexandria, April 12, 1928, *ibid.* 1928, 777 at 783.

²⁸ Adding this term is convenient but not necessary.

²⁹ For instance, in the cases of the *Serbian and Brazilian loans*, submitted to the Permanent Court of International Justice, *J.D.Int.* 1929, 977 at 1012; in the case of the loan of the Austrian State Railway Co., passed on by the *Reichsgericht*, *R.G.Z.* 118, 370; in the case of some loans of the *Crédit Foncier Franco-Canadien*, *supra*, n. 27; in the case of the loan of the *Société d'Héraclée*, passed on by the Swiss Federal Tribunal, Feb. 11, 1931, *Amtliche Sammlung* 57 II 69, *J.D.Int.* 1931, 510. Under the customary phrasing of the bonds and coupons conversion into the local currency must be made at the rate of exchange prevailing at the indicated date of maturity rather than at the date of presentation by the holder. Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497 at 507.

³⁰ An exceptional situation is presented in the case of the Belgian *Compagnie Internationale des Wagon-Lits*, *infra*, p. 457, n. 40.

multiple collection clause. There may be nothing but a "disguised" foreign currency debt without any complexities of a territorial nature. This was true, for instance, in the case of the loan bonds of the Alberta and Great Waterways Railway Company where only pounds sterling were owed. In another Canadian case, *Royal Trust Co. v. Oak Bay*,³¹ the bond called for payment of 500 Canadian dollars or £102.14s.10d., "its sterling equivalent, at the rate of \$4.86½ to one £", payable in Toronto, London and other places, at the option of the holder. This was a multiple currency clause entitling the holder either to \$500 or to £102.14s.10d., the underlying pound-dollar ratio being set out in the bond. The court, however, only awarded the bondholder Canadian dollars which were then at a discount.³²

The value of multiple currency or multiple collection clauses may be diminished or destroyed by exchange control regulation or by restrictions upon foreign currency stipulations. Norway has enacted a special statute affecting multiple currency and multiple collection bonds held by Norwegian creditors domiciled in Norway.³³

II. Ambiguous Currency Terms in "Multiple" Clauses

The situation is particularly fruitful of litigation where the option clause is couched in ambiguous currency terms such as "francs". If, for instance, a pre-war bond or coupon, calling simply and plainly for a payment of "francs" is payable in Paris, Brussels and Zurich the question becomes momentous whether the holder is, at his option, entitled to French, Belgian or Swiss francs, according to the place of presentation, or whether there is a basic franc, say the French franc, determinative, through the rates of exchange, of the payments to be made in Belgium and Switzerland. Again the

³¹ [1934] 4 D.L.R. 697 (British Columbia Sup. Ct., 1934).

³² It was poor draftsmanship to state in the body of the bond the reason for the oddness of the sterling amount (namely the 4.86½ ratio). This, however, does not justify the decision. The court listed a number of cases which were either irrelevant or supported the contrary view, and then concluded abruptly with a decision for the defendant. Contrariwise, a disguised foreign-currency debt was erroneously interpreted as a multiple collection clause by the Civil Tribunal of Naples, Feb. 21, 1936, *Foro Italiano*, 1936 I 498.

³³ Law n. 17 of July 6, 1933, according to Domke, "*Les efforts législatifs tendant à restreindre la validité de la clause or*", *Revue Critique de Droit International* 1938, 22 at 24, no. 2.

alternatives are "multiple-currency clause" or "multiple collection clause". In conformity with the view taken above, a multiple currency clause should be deemed to exist in the absence of a "current-rate-of-exchange" provision even when the issuer is domiciled in a country where the ambiguously named monetary unit has depreciated. If the issuer has appealed to the investors of a foreign capital market, by instituting and advertising agencies for the service of the loan³⁴ there and has employed the name of the money current in that country, it is fair to assume that the prospective investors interpreted that name to refer to their national currency and that the issuer expected them so to understand the reference. To put it another way, the promise must be construed under the circumstances in which it was understood at the place of payment.³⁵ Canadian,³⁶ Swiss³⁷ and Egyptian³⁸ decisions are in accord with this view. Similarly a New Zealand municipality which had issued pound bonds payable in Auckland and London, before the English and the New Zealand pound had become separated, was held by the Privy Council to be liable to redeem its bonds in English pounds. That the New Zealand municipality had borrowed in terms of a foreign currency was held not *ultra vires*.³⁹ But a Belgian and a Danish court for feeble reasons took a different view, the Belgian court when passing on coupons of a Belgian company issued in terms of "francs" and payable in Brussels,

³⁴ Lyons-Geneva Railroad bonds of 1856, subscribed to in France and Switzerland, called for payment in francs with no Swiss place of payment. A simple French-franc indebtedness existed, the issues being those of a French corporation. *Cour de Justice* of Geneva, April 25, 1934, cited by Pictet "*L'Option de Change*", in (1935) 54 *Zeitschrift für Schweizerisches Recht* 318. Nor were foreign places of payment provided in the case decided by the *Reichsgericht*, Nov. 22, 1928, *supra*, p. 450, n. 16.

³⁵ *Reichsgericht*, Nov. 14, 1929, *R.G.Z.* 126, 196 at 208 (Viennese loan of 1902), quoting this writer.

³⁶ *Corporation des Obligations Municipales limitée v. Ville de Montréal Nord*, 59 *Rapports Jud. Québec, Cour Sup.* 550 (Superior Ct., 1921); *Les Commissionnaires de L'Ecole de la Municipalité Scolaire de St. Charles v. La Société des Artisans Canadiens Français*, 33 *Rapports Jud. Québec, Banc du Roi*, 448 (K.B., 1922).

³⁷ Swiss Federal Tribunal, May 23, 1928, *Amliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497 at 504 (loan of the *Crédit Foncier Franco-Canadien*).

³⁸ Mixed Appellate Court of Alexandria, April 12, 1928, *J.D.Int.* 1928, 777 (loan of the *Caisse Hypothécaire D'Egypte*, a Belgian corporation).

³⁹ *Auckland Corp. v. Alliance Assurance Co. Ltd.*, [1937] A.C. 587 (Privy Council, 1937). See also *supra*, p. 153, n. 24.

Paris and Switzerland,⁴⁰ and the Danish court in the case of a *kronor* loan of a Danish company payable in Copenhagen and in Stockholm.⁴¹ In both cases the debtor was held to be obligated only in his depreciated national money. Again, in *Broken Hill Proprietary Co., Ltd. v. Latham and others*,⁴² the English Court of Appeal held that bonds issued by an Australian company and payable in pounds in certain Australian cities and London must be interpreted as calling for payment of Australian pounds, Lord Hanworth dissenting in a strong opinion; thus, to the detriment of the English bondholders, the majority found that merely a "multiple collection clause" based on Australian currency existed. This case, however, was explicitly overruled by the House of Lords in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*⁴³

Particularly interesting is the attitude of the French courts. Before the war, a number of French companies had floated loans in France and in Switzerland, the bonds being phrased merely in terms of "francs" and made payable in certain French and Swiss places at the agencies indicated in the bonds and coupons. All these bonds had been listed on Swiss stock exchanges. Contrary to the gold clause situation, the French were now on the debtors' side in this typical factual set-up.⁴⁴ Would the French courts which in the gold

⁴⁰ Appellate Court of Brussels, March 11, 1921, *Pasicrisie Belge*, 1921 II 70 (loan of the *Compagnie Générale pour l'Eclairage et le Chauffage par le Gaz*). The situation was different in the case of the bonds of the (Belgian) *Compagnie Internationale des Wagons-Lits*, where payment of francs in "Paris, Brussels, Liège, Cologne, Amsterdam and London" was promised. In view of the three last mentioned places of payment no *option de change* was in question, and an independent "international" gold franc, namely a franc of the Latin Monetary Union never did exist. *Cour de Cassation*, Dec. 6, 1933, *D.H.* 1934, 34; Appellate Court of Paris, July 23, 1931, *Gazette du Palais*, 1934 I 894; and passing on the same loan *Kammergericht* (Appellate Court of Berlin), Sept. 25, 1928, *J.W.* 1929, 446. As to the Latin Monetary Union, see *supra*, p. 155. There is a somewhat comparable common law case in *Saskatoon City v. London and Western Trusts Co., Ltd.*, [1934] 1 D.L.R. 103 (Saskatchewan Court of Appeal, 1933), regarding dollar debentures payable in Montreal, New York and London. This meant Canadian dollars.

⁴¹ Supreme Court of Denmark, Dec. 17, 1925, *J.W.* 1926, 2030 (loan of the *Kongeriget Danmarks Hypotekbank*), with a forceful critical annotation by Professor Henry Ussing, Copenhagen.

⁴² [1933] Ch. 373 (C.A., 1932).

⁴³ [1934] A.C. 122 (H. of L., 1933).

⁴⁴ A Swiss debtor corporation was involved in the case of the *Papeteries de Courtelary et Chenevières*, the bonds of which were payable in Switzerland and France. The Appellate Court of Nancy, Nov. 9, 1926, *J.D.Int.* 1928, 96, assuming an *option de place*, held the Paperies liable only for payment of French francs. The circumstances

clause cases took a course so extremely favorable to the creditors, under reversed factual conditions again protect the creditors? They did not. While the trend in the lower and Appellate courts was originally more favorable to the creditors,⁴⁵ the *Cour de Cassation*, discarding the traditional place-of-payment theory,⁴⁶ laid down a striking pro-debtor ruling in several leading decisions. In the case of the bonds of the Company *L'Est Lumière*, the company, sued by a Swiss bondholder for Swiss francs, set up as a defense that according to their correspondence the Swiss banking houses entrusted with the service of the loan had "received" the subscriptions to the loan in French francs and that it was in such francs that the company was credited. The *Cour de Cassation*,⁴⁷ reversing the decision of the Appellate Court of Paris,⁴⁸ held this defense good, considering it entirely immaterial "how small the discount between the two currencies may have been". However, the defense was immaterial, so far as the *bondholders* were concerned, at least to the extent that it was based on the correspondence between the issuer and its Swiss *banks*. The bonds and the prospectus were conclusive as to the rights of the bondholders⁴⁹ and contained nothing about "French" francs. As to the fact that the company had "received" the subscriptions in francs, the court did not make it clear what was meant thereby. Probably no more than that the company had been credited for the subscribed amount in French francs. Yet it is more than probable that the Swiss banks debited their Swiss customers in terms of Swiss francs; there is, in the cases, no indication to the con-

were extraordinary, however. The whole of the loan, designed for the establishment of a plant situated in France, had been subscribed to in France and the bonds carried several exclusively French references (no deduction of French income tax; debt dischargeable through payment into the *Caisse de Dépôts et Consignations* of a French City; domicile elected in France; a French bank being the only representative [trustee] of the bondholders, etc.)

⁴⁵ See, on the one hand, Appellate Court of Paris, Jan. 7, 1932, *Gazette du Palais*, 1932 II 651, *infra*, n. 48; same court, Feb. 14, 1934, *Gazette du Palais*, 1934 I 796, *infra*, n. 52; Appellate Court of Besançon, Dec. 30, 1931, *D.H.* 1932, 123, *infra*, n. 51; on the other hand, Appellate Court of Besançon (different division), Dec. 28, 1931, *Gazette du Palais*, 1932 II 655.

⁴⁶ *Supra*, p. 437, n. 2.

⁴⁷ June 5, 1934, *J.D.Int.* 1935, 90.

⁴⁸ Judgment of Jan. 7, 1932, *supra*, n. 45.

⁴⁹ As was acknowledged three years later by the same Court in the decision cited in n. 53. The latter view cannot be questioned, see e.g., 1 Lacour & Bouteron, *Précis de Droit Commercial* (3d ed., 1925) 761.

trary. Even assuming that the subscription forms did carry a reference to French francs no serious importance could be attributed thereto, both currencies having been at par. Since no such reference was incorporated in the bonds or prospectus, however, it could not be used against a bondholder.

Another judgment of the *Cour de Cassation* regarding the bonds of the *Papeteries Bergès*,⁵⁰ is similar. French real estate of the company had been mortgaged to bondholders who in their application to record the mortgage figured the amount of the debt in terms of French francs because under French law that is a prerequisite of public registration. The *Cour de Cassation*, again reversing the decision of the Appellate Court,⁵¹ inferred from the statement in the bondholders' application that the latter, having made no reservation as to the currency, had thereby fixed the money of contract in terms of French francs. A reservation, however, would have been ineffective and irrelevant and was therefore not to be expected in view of the attitude of the law. In truth the prospectus stated that the subscribers in their application had evaluated the principal of the debts "as of a number of francs equal to the face amount of the bonds", but there is no warrant for inferring from this informative remark, as the Court did, that it was intended thereby to give the debt a French-franc character. Certainly Swiss investors cannot be supposed to be aware that French law does not allow mortgage registration except in terms of French francs. The reasoning of the Court is all the more puzzling since the same company had previously issued bonds under the clause "payable at the rate of exchange on Paris" but had omitted this reference in the bonds at bar. A year later the holders of the bonds of another French company, *The Société des Hôtels Splendide, Royal and Europe d'Aix-les-Bains*, suffered the same fate. In this case there were only Swiss places of payment, the entire loan having been floated in Switzerland. The Appellate Court of Paris therefore gave judgment against the company for payment of Swiss francs.⁵² Still the bondholders were so unfortunate as to have secured the loan by a first mortgage on French real estate, and that fact had been mentioned in the prospectus. The *Cour de Cassation*

⁵⁰ July 21, 1936, *J.D.Int.* 1937, 299.

⁵¹ Judgment of the Besançon Court, Dec. 30, 1931, *supra*, n. 45.

⁵² Judgment of February 14, 1934, *supra*, n. 45.

again reversed, using the very same reasoning as in the *Papeteries de Bergès* case, despite the absence of any French place of payment.⁵³

In the fourth case, regarding the bonds of the French *Brasseries de Sochaux* the *Cour de Cassation*⁵⁴ relied primarily on the incidental fact that the bondholders knew the company operated on a French-franc basis which, however, is the typical situation in foreign loans. Furthermore the court stressed the fact that the quotations of the bonds on the Swiss stock exchanges had always corresponded to their value in terms of French francs. Still in the cases of veritable or alleged gold bonds the French courts never took into account whether or not the expectation of gold was operative in raising quotations. Generally it was not,⁵⁵ nor will the influence of such an expectation be even traceable in the great majority of cases. The very fact that a foreign corporation refuses to honor an obligation flowing from a bond and that a law-suit thereon must be conducted in the foreign country is sufficient to keep quotations down.

On the basis and in the spirit of these decisions still other "multiple-franc-bond" cases were disposed of by French courts.⁵⁶ It is gratifying to state that here again French legal writers opposed the judgments of the *Cour de Cassation*.⁵⁷

⁵³ Judgments of July 19, 1937, *D.H.* 1937, 567.

⁵⁴ Judgment of July 17, 1935, *J.D.Int.* 1936, 880, affirming Appellate Court of Besançon, Dec. 28, 1931, *supra*, n. 45.

⁵⁵ See *supra*, p. 321, n. 33.

⁵⁶ Judgments of the Appellate Court of Paris, May 3, 1935, *J.D.Int.* 1936, 624 (*Papeteries de Bergès*) and *Nouvelle Revue de Droit Int. Privé*, 1935, 337 (*Fabrique de Pâtes à Papier et de Cartons du Sud-Est*); Dec. 20, 1935, *Gazette du Palais*, 1936 I Index 102, n. 6, 7 (Lyons-Geneva R. R. Bonds); Appellate Court of Amiens, Jan. 30, 1935, *D.H.* 1935, 203 (*L'Est-Lumière*). *Cour de Cassation*, Feb. 24, 1937, *Nouvelle Revue de Droit Int.*, 1937, 589, allowing the *Crédit Foncier Franco-Canadien* to pay in Switzerland certain bonds in French francs, does not state the wording of the bonds exactly enough to permit analysis. Where a Frenchman had contracted in Switzerland with a Swiss life insurance company for a franc annuity payable in France or in Switzerland, the company was held liable to pay Swiss francs. *Cour de Cassation*, March 31, 1933, *J.D.Int.* 1934, 373, affirming Appellate Court of Paris, May 10, 1928, *Gazette du Palais*, 1928 II 430. The adjudication, however, was to the contrary where the contract was made in France with the "frenchified" branch establishment of the Swiss company. *Cour de Cassation*, Nov. 28, 1932, *J.D.Int.* 1934, 133. See *supra*, p. 346, n. 53.

⁵⁷ The *L'Est Lumière* case was criticized by Professor André-Prudhomme, editor of the *J.D.Int.*, *ibid.*, 1935, 90 at 93; by Mr. Seignol, *L'Option de Change et L'Option de Place* (1935) 229; and in *Gazette du Palais*, 1934 II 87 at 89 (anonymously). The two other cases were

The "franc" issue has also been passed on by the Appellate Division of the Supreme Court of New York. The bonds litigated had been issued before the war by American railway companies in terms of "francs", payable in France, Belgium and Switzerland. When a bondholder claimed Swiss francs to be paid in Switzerland, the court, reversing the sounder decision of the court below, dismissed the suit, because the bond was written in the French language and "franc" was defined "by several dictionaries" as "French coin".⁵⁸ Never has so fallacious an argument been used even by French courts in favor of French debtors. By this judgment the American company which received its earnings in undepreciated dollars obtained an extraordinary profit indeed.

III. Relationships Among the Currencies Alternatively Promised

The independence of the amounts alternatively promised under a multiple currency clause has sometimes been questioned. In the Morgan loan of 1917 the English government had promised the bondholders to pay gold coin in New York, or, in London, sterling money at the fixed rate of \$4.86½ to the pound. After the United States had abrogated the gold clauses the question arose, among others,⁵⁹ whether or not the gold guaranty extended to the sterling promise. This question was answered in the negative by the Court of Appeal, Lord Wright expressly stating for the Court: "The two options are entirely independent. Each provides for the payment of a particular sum in a particular place in a particular way . . . the gold clause is not imported in any way into the London option".⁶⁰ The Court's lofty unconcern

disapproved of by Professor Perroud in *J.D.Int.* 1936, 883; 1937, 301. The present writer does not know of any literary utterances to the contrary.

⁵⁸ *Levy v. Cleveland, Cincinnati, Chicago and St. Louis R. R.*, 210 App. Div. 422, 206 N.Y. Supp. 261 (1921). The court relied also on the Belgian *Compagnie Générale* case, *supra*, p. 457, n. 40, entirely overlooking the fact that a Belgian issuer and Belgian francs were involved, not to speak of the error of the Belgian court.

⁵⁹ *Supra*, p. 387.

⁶⁰ [1937] A.C. 500 at 522. This part of the judgment was not appealed, see the remarks by Lord Maugham at 561. A similar view was advanced by the City Court of Helsingfors, Dec. 23, 1937, *Bull. I.I.I.* 38, 280, in the case of Finland's American gold dollar loan of 1928 which gave the bondholder the right to collect in Amsterdam the

for British financial interest⁶¹ imparts double weight to its theory. As a matter of fact the divergence between the two formulas chosen is explainable. Corroborating a sterling promise by a gold clause would have been entirely unusual and suspicious.⁶² Had the British Government done it during the war it would possibly have affected the credit of the English pound. Morgan and Co. were content with a gold dollar clause. They and the bondholders relied, as did other bankers and investors, on the imperturbability of the gold dollar and consciously renounced a gold sterling clause.

The contrary view, favoring the creditors, was taken by the French *Cour de Cassation*⁶³ and the Swiss Federal Tribunal⁶⁴ in respect to the pre-war loan of the Turkish *Société d'Héraclée* whose coupons ran in terms of "(25) francs or 110 gold piasters" and were payable in Constantinople in gold piasters, in Paris in francs, in Geneva "at the rate of exchange". The same provisions applied to the bonds called in. Apparently it was intended thereby to protect the bondholders against monetary manoeuvres of the Turkish government whose record in that respect was none too good at the time.⁶⁵ "Francs" were to be paid in Geneva as well as in Paris and French francs were meant, as is evident from the reference to the "rate of exchange" which expresses a relationship between monetary units.⁶⁶ After Turkey had invalidated gold clauses,⁶⁷ the situation, in view of the bonds and coupons, was more propitious to the debtor than in the case of the Morgan loan. The French and the Swiss courts, however, read into the bonds and coupons a gold guaranty covering all three alter-

equivalent in guilders of the gold dollar amount owed. After the enactment of the Joint Resolution, the court held, only the equivalent of the nominal dollar amount was collectible in Amsterdam.

⁶¹ *Supra*, p. 388.

⁶² *Supra*, p. 305.

⁶³ July 7, 1931, *J.D.Int.* 1932, 403 at 416, adopting the theories and conclusions of the *Procureur Général* Matter at 403.

⁶⁴ Feb. 11, 1931, *Amliche Sammlung* 57 II 69, *J.D.Int.* 1931, 510.

⁶⁵ See Blaisdell, *European Financial Control in the Ottoman Empire* (1929).

⁶⁶ Some issues of the Serbian laws, passed on by the Permanent Court of International Justice, called for payment of gold francs in Paris and for payment of local currency "at the sight rate of exchange in Paris" in certain other places. Hence the equivalent in paper francs of the gold francs promised had to be computed and then to be converted, at the rate of exchange, into the local currency. *J.D.Int.* 1929, 997. This painstaking and unusual procedure presupposes the existence of an express reference to *gold* francs.

⁶⁷ *Supra*, p. 358, n. 5.

natives, the *Cour de Cassation* again employing the concept, refuted by the Swiss Court, of an "international loan" which in the opinion of the court imposed the interpretation used. The *Cour de Cassation* even went a step further in the case of the pre-war loans of the City of Tokio.⁶⁸ This loan had been divided into three separate parts ("tranches"), an English tranche payable in London, an American one payable in New York, both running in terms of pounds sterling, and a French tranche, running in terms of francs, payable in Paris and "at the rate of exchange on Paris", in Brussels. Still the *Cour de Cassation* found that on the French tranche also, pounds sterling rather than francs were owed because in the prospectus of the loan the total of interest and amortization to be supplied annually for the service of the three tranches was phrased in terms of pound sterling. However, no more was obviously intended by the prospectus than to give a survey of the cost of the service, probably contrasted with the receipts of the city, and this could properly be done only on the basis of a unified currency, the English currency being the most appropriate under the circumstances.⁶⁹ No change in the unambiguous terms of the bonds and coupons could fairly be inferred therefrom. The theory of the court makes entirely nugatory the separate formulation and monetary denomination of the French tranche.⁷⁰

⁶⁸ Jan. 14, 1931, *J.D.Int.* 1931, 126 at 153 (two cases) likewise adopting the suggestions of the *Procureur Général* Matter at 129.

⁶⁹ Savatier, *D.P.* 1931 I 10, commenting on the judgment, well poses the question whether the theory of the Court would have been the same had the pound depreciated rather than the franc. The Supreme Court of Japan in December, 1934, decided contrary to the judgment of the *Cour de Cassation*. Thereafter the Japanese Vice-Minister of Finance issued a strong statement against the French judgment, U. S. Dept. of Commerce, *Handbook of Foreign Currencies* (1936) 120.

An attitude exactly opposite to that of the *Cour de Cassation* was taken by the *Reichsgericht* in the case of the pound loan of the City of Hamburg, judgment of February 7, 1938, *J.W.* 1938, 1109, *supra*, p. 317, n. 14.

⁷⁰ One of the decisions appealed to the *Cour de Cassation* was rendered by the Appellate Court of Besançon, Dec. 12, 1928, *J.D.Int.* 1929, 1062, which advanced the theory that a multiple currency clause, in itself, implies a gold clause inasmuch as it presupposes an equivalence of currencies, which can exist only on a gold basis. This theory was fully discussed in French legal writings, see Seignol, *L'Option de Change de L'Option de Place* (1935) 152. Mr. Seignol refers to an alleged judgment of the Mixed Appellate Court of Alexandria, Jan. 21, 1933, *Journal des Tribunaux Mixtes* of Jan. 27 and 28, 1933, *J.D.Int.* 1933, 428, as employing the same theory. Yet the judgment was ren-

SECTION 36

FOREIGN CURRENCY IN DAMAGES AND OTHER
UNLIQUIDATED DEBTSI. *Foreign Currency Incidental to Damages*¹

In common law countries, damages, under the rule discussed, can only be granted in the currency of the forum, regardless of where the damage occurred, of which state the parties are nationals or residents, and which currency the damaged party used for the purpose of reparation. The day when the claim arose—in tort cases the day when the tort was committed—is generally recognized as determinative for the conversion of the foreign currency² which is thereby degraded to a “money of measure”. This is in accord with the breach-day rule of the law of contracts; as a matter of fact the rule is generally considered as a unified one looking to the day when the wrongful act, tort or breach, occurred.³ Still under Mr. Justice Holmes’ rule in *Deutsche Bank v. Hum-*

dered, in reality, by the Civil Tribunal (not the Mixed Tribunal nor the Appellate Court) of Cairo and it did not rest on that theory. Nor is the latter supported by Mixed Appellate Court of Alexandria, May 19, 1927, *J.D.Int.* 1928, 765, also referred to by Mr. Seignol. Quite recently the “unity” doctrine in respect to multiple currency clauses has been rejected by the Italian Court of Cassation, July 29, 1938 *Foro Italiano* 1938 I 1527.

In a case where one of the alternatively stipulated amounts called for the payment of gold dollars, the theory of a gold promise permeating the whole multiple currency was lately advanced by an American court. *Supra*, p. 453, n. 25.

¹ The American and English writings cited *supra*, p. 427, n. 20, cover this subject matter also. See, furthermore, Ascarelli, Note, “*Risarcimento del danno e moneta estera*”, *Foro Italiano*, 1929 I 753.

² *The Verdi*, 268 Fed. 908 (D.C. S.D. N.Y., 1920); *Page v. Levenson*, 281 Fed. 555 (D.C. Md., 1922) (tort cases); *Moser v. Corn*, 140 Misc. 417, 249 N.Y. Supp. 606 (1931), *aff’d* 234 App. Div. 842, 254 N.Y. Supp. 922 (1931) (conversion); *S. S. Celia v. S. S. Voltorno*, [1921] 2 A.C. 544 (H. of L., 1921); *The Baarn*, [1934] P. 171 (C.A., 1934) (tort cases); *Di Fernando v. Simon Smits & Co.*, [1920] 3 K.B. 409 (C.A., 1920); *Barry v. Van den Hurk*, [1920] 2 K.B. 709 (K.B., 1920); *Lebeaupin v. Crispin*, [1920] 2 K.B. 714 (K.B., 1920) (unliquidated damages); *McDonald v. Wells*, 45 C.L.R. 506 (High Ct. of Australia, 1931) (rescission); *Compagnie Maritime Normande v. United States*, (1938) Am. Mar. Cases 347 (D.C. S.D. N.Y., 1938) (tort).

³ See also *Hoppe v. Russo-Asiatic Bank*, 235 N.Y. 37, 138 N.E. 497 (1923) professing to make no distinction between debt, unliquidated damages and torts; Fraenkel, “Foreign money in domestic courts”, (1935) 35 *Col. L.R.* 360 at 386.

phrey,⁴ damages originating abroad under foreign law and in a foreign currency are to be converted under the judgment-day rule.⁵ A theory tending to the contrary, however, was advanced by the English Court of Appeal to the effect that claims for damages, if submitted to an English court, are considered to call at the outset for payment in English pounds.⁶ If, for instance, a tort was committed in Italian territory, Italian law governing, and a loss in lire had been inflicted upon the injured party, the wrongdoer, suing in an English court, would not be able, under this theory, to discharge his obligation by tendering payment in Italian money. This deviation from the debt rule certainly makes things simpler for the court but is nevertheless unfortunate because it obviates the natural course of events and affords the creditor another reason for using legalistic manoeuvres to invoke the jurisdiction of an English court.⁷ The doctrine criticized has not yet been used by American courts.

In civil law courts, as was seen above, there is generally nothing to prevent judgments from being rendered in terms of foreign money or in an amount of the national money equivalent at the time of payment to a certain sum of foreign money. However, in the field of damages there is a strong tendency to fix the damages in terms of the national currency. This tendency is apparent in German judgments,⁸

⁴ *Supra*, p. 429.

⁵ *The Integrity*, 3 F. Supp. 891 (D.C. Md., 1933) (unliquidated damages); *The West Arrow*, 80 F.(2d) 853 (C.C.A. 2d, 1936). The same view already appears in *The Hurona*, 268 Fed. 910 (D.C. S.D. N.Y., 1920).

⁶ In the *Baarn* case, *supra*, n. 2 (opinions of Greer, L.J., and Romer, L.J.).

⁷ See the opinion of Scrutton, L.J., in the *Baarn* case.

⁸ In the case of *Reichsgericht*, Feb. 27, 1924, J.W. 1925, 1477, a shipper had been prejudiced by the fact that he had to pay a guilder fine to the Rotterdam port authorities, owing to wrong declarations made by the defendant. The latter was held liable to pay guilders, a very simple solution indeed under the circumstances. See furthermore *Reichsgericht*, Oct. 28, 1922, R.G.Z. 105, 312 (damages in Swiss francs on the basis of the Berne International Convention, *infra*, p. 467). In all of the other cases marks were awarded. Judgments of June 4, 1919, R.G.Z. 96, 121; Feb. 8, 1921, R.G.Z. 102, 60; March 29, 1922, *Warnemeyers Rechtsprechung*, 1922, 98; May 6, 1924, *ibid.*, 1923/1924, 178; June 30, 1925, R.G.Z. 111, 183 (gold mark); Oct. 24, 1925, J.W. 1926, 360; Dec. 9, 1927, *Höchststrichterliche Rechtsprechung*, 1928, n. 610. In the 1919 case the reason was advanced that due compensation can be made by awarding an amount in the national currency. The 1922 and 1924 cases confine the rule, unconvincingly enough, to lost profits (*lucrum cessans*) which were there involved. The judgments of Dec. 7, 1923, *Hanseatische Gerichtszeitung*, 1924, 64 and April 28, 1924, J.W. 1924, 1593

and also in other civil law decisions.⁹ It is probably due to a need for simplification, since damage situations involving foreign currency incidents are particularly intricate.

No matter whether there is or is not a compulsory conversion the first problem is to ascertain what may be called, analogously to the "money of contract", the "money of damages", namely the basic currency in which judgment has to be rendered and, in the case of compulsory conversion, which is the "money of measure". It has sometimes been believed that the money of the territory whose law governs the case is the money of damages,¹⁰ at least where damages result from a tort. However the question of the currency involved is primarily a matter of fact rather than of law; in a tort situation governed by American law, say in a collision of English ships in American waters, damages caused in English money may play the same rôle as English "money of contract" in American contracts. Moreover it is undesirable to tie up the determination of the "money of damages" with the hazy and contradictory conflict of laws doctrines referring to contracts, quasi-contracts and torts all of which may give rise to damages. While this negative tenet may be considered as rather certain it is difficult to set up an affirmative standard for the determination of the "money of damages". The best standard comparatively seems to be the currency under

stress the point that both parties were Germans. The "local-payment" doctrine, *supra*, p. 422, is almost immaterial in the face of these rulings; in fact it is appropriate only in the case of debts. Italian Court of Cassation, July 20, 1936, *Foro Italiano*, 1936 I 1118 (construing art. 39 of the Commercial Code) *Contra*: *Reichsgericht*, Oct. 28, 1922, *R.G.Z.* 105, 312, but this view has disappeared in the later cases.

⁹ Ital. Court of Cassation, June 11, 1926, *Giurisprudenza Italiana*, 1926 I 1096; July 20, 1936, *Foro Italiano*, 1936 I 1118; Appellate Court of Rennes, May 12, 1927, *J.D.Int.* 1929, 680; Swiss Federal Tribunal, May 3, 1921, *Amlicke Sammlung* 47 II 190; Court of Rotterdam, Dec. 20, 1933, *Weekblad van het Recht*, 1933 No. 12819, p. 4. *Contra*: Appellate Court of Rouen, Nov. 26, 1924, *J.D.Int.* 1925, 672 allowing a judgment in pounds sterling. Still the court held that "delay interest" should be computed on the franc equivalent of the foreign money owed, assessed at the date when suit was brought.

¹⁰ Thus by Pisco, *Lehrbuch des Oesterreichischen Handelsrechts* (1923) 155. The same theory has sometimes been used by the courts, usually to justify the use of the national currency. Austrian Supreme Court, June 23, 1925, *Die Rechtsprechung*, 1926, 36; Appellate Court of Hamburg, March 15, 1922, *J.W.* 1922, 1142; Appellate Court of Brussels, Nov. 17, 1923, 6 *Revue de Droit Maritime Comparé* 134. Similarly, in *Gerli v. Compagnie Générale Transatlantique*, 132 Misc. 752, 230 N.Y. Supp. 282 (1928), damages for breach of contract were computed in terms of French francs, on the ground that the contract was French.

which the damaged party did his business or if he had no business, was living. This means practically that the currency of his domicile should normally be contemplated. For instance, to change slightly the fact situation in the *Baarn* case,¹¹ if a Chilean ship collides in Ecuadorean waters with a Dutch ship, and is repaired in a Peruvian port, the Chilean money expended to obtain the needed Peruvian exchange should be the amount to be converted into dollars, if suit is brought in the United States. For the business of the Chilean shipowner is supposed to be run on the basis of Chilean currency, and even if the loss sustained consisted in the loss of sterling freightage the normal assumption should be that the Chilean would ordinarily have converted the sterling currency into his national money.¹² However this is no more than a flexible standard to be resorted to in case of doubt.

Much litigation has arisen in continental courts with regard to goods lost or damages sustained in international railway transportation. On the basis of the Berne International Convention on Railway Merchandise Transportation, a multilateral treaty to which most of the continental countries adhere,¹³ the weight of authority is in favor of assessing the value of the goods which is the measure of damages, in the currency of the place of delivery, and at the time of delivery to the railway; the amount so ascertained is to be paid by the railway in its national currency at the rate prevailing at the time of payment.¹⁴ If, then, the "money of damages" has depreciated, the loss must be sustained by the consignor, whereas the railway has to bear the risk of a depreciation of its national currency. This solution, sanctioned in 1924 by

¹¹ *Supra*, n. 2.

¹² Similarly *Det Forenede Dampskibs Selskab v. Insurance Co. of North America*, 31 F.(2d) 658 (C.C.A. 2d, 1929), and the reasoning of the court in the *Wimbledon* case, *infra*, n. 24.

¹³ International Conventions concerning the Traffic of Goods by Rail (C.I.M.): Berne 1890, 13 Martens, *Nouveau Recueil* (2d Series) 447; Berne 1924, 77 League of Nations, *Treaty Series* 367. Art. 39 of the 1890 Convention is in point.

¹⁴ See *Reichsgericht*, Nov. 17, 1923, *J.W.* 1924, 1362; Sept. 24, 1924, *R.G.Z.* 109, 16 at 20; Austrian Supreme Court, June 15, 1921, 4 *Die Rechtsprechung* 68; *contra*, Court of Cassation (Rome), Feb. 11, 1922, *Foro delle Nuove Provincie*, 1922 I 168; Austrian Supreme Court, July 13, 1921, 4 *Die Rechtsprechung* 69; June 13, 1922, 4 *Entscheidungen des Obersten Gerichtshofs in Zivilsachen*, no. 152. Further references in 5 Travers, *Le Droit Commercial International* II (1933) secs. 5522-5524. See also *Reichsgericht*, June 9, 1926, *J.W.* 1927, 1102.

the revised Convention,¹⁵ can hardly be regarded as of general significance since the liability of the railway carrier is very definitely fixed and restricted by the Convention (in accord with most national legislation).

Leaving aside this special, though practically important question, there is in the civil law courts a distinct tendency to throw the risk of depreciation of the money of damages upon the wrongdoer.¹⁶ The *Reichsgericht* has occasionally even granted damages in terms of "gold marks",¹⁷ a device available under a German procedural statute.¹⁸ An early English case also advances the view that the wrongdoer has to bear the loss caused by a depreciation of the foreign money of damages.¹⁹ On the whole, however, the question is disposed of by the Anglo-American courts through their conversion rules.

II. Damages in International Courts

International courts, in allowing damages, quite naturally tend to make the sum allowed independent of the monetary policy of the government held liable. Sometimes arbitration treaties grant the tribunals power to give judgment on a gold basis.²⁰ International courts have used this method even in the absence of express authority.²¹ In other

¹⁵ Art. 29.

¹⁶ *Reichsgericht*, Sept. 24, 1924, *R.G.Z.* 109, 16 at 20; Italian Court of Cassation, March 6, 1926, *Foro Italiano*, 1926 I 529; Nov. 20, 1929, *ibid.*, 1930 I 18; July 20, 1936, *Foro Italiano*, 1936 I 1118. After much vacillation, the Belgian Court of Cassation took the same stand in the judgments of Jan. 17, 1929, 23 *Revue du Droit Maritime Comparé* 91 and of Feb. 26, 1931, 25 *ibid.* 75. The vicissitudes of the Belgian rulings and the uncertain French development as to this matter are carefully discussed in the annotations to the Belgian decisions.

¹⁷ Judgment of June 30, 1925, *R.G.Z.* 111, 183.

¹⁸ *Supra*, p. 331, n. 21.

¹⁹ *Pilkington v. Commissioners for Claims on France*, 2 Knapp 7 at 20, 12 Eng. Rep. 381 at 386 (Privy Council, 1821), regarding the depreciation of the French franc during the French Revolution. The court even ventured this broad statement: "If the (wrongful) act is to be undone, it must be completely undone, and the party is to be restored to the situation in which he was at the time the act to be undone took place", thus applying a formula used later on by the German Civil Code 249, par. 1. In the face of a depreciation of the English pound, that view would not prevail. *Supra*, p. 251, n. 11.

²⁰ See Feller, *The Mexican Claims Commissions 1923-1934* (1935) 312; *Orinoco S. S. Co.* case between the United States and Venezuela, Protocol of submission, Art. IX, Scott, *Hague Court Reports* (1916) 226, 239.

²¹ See Feller, *loc. cit.*, 313, 314 and next note. In 1863, the United States was held liable in an arbitral award to pay to Montano, a Peru-

cases the currency of the claimant has been chosen by the court, as happened in the *Wimbledon* case, almost the only international law case in which an international court in terms examined the monetary problems involved. The allied powers, on behalf of a French freighter, had brought a suit in the Permanent Court of International Justice against Germany for not having permitted the vessel which was carrying contraband to go through the Kiel Canal. The German Government took the view that a government can only be held liable to discharge its obligations in its national money. The court, however, allowed damages in French francs because French currency was "the currency of the applicant (*namely of the French freighter*) in which his financial operations and accounts are conducted, and it may therefore be said that this currency gives the exact measure of the loss to be made good".²² Again there are cases where the currency of a country not a party to the litigation has been selected by the court, but that can only be justified on special factual grounds.²³ The theory relied on by the German Government in the *Wimbledon* case seems to have been used by international courts in only a few cases.²⁴ For the conversion of one currency into another the breach-day rule has been employed by the United States-Mexican General Claims Commission (1924-1927).²⁵

The Peace Treaties terminating the World War provided for an assessment of debts due by a national of one of

vian citizen, \$24,000 and interest in "current money". When the United States offered paper dollars (see 11 Op. Att. Gen. 52), Montano, by another award in 1869, was held entitled to a gold payment. 7 Moore, *International Law Digest* (1906) 51, cf. 2 Moore, *International Arbitrations* (1898) 1638, 1645, 1649.

²² Permanent Court of Int. Justice, Aug. 17, 1923, Series A, No. 1 (1923) at 32. See also Series C, No. 3, Addl. Vol., p. 151. Similarly in the *Chorzów* case (Permanent Court of International Justice Series A, No. 17, Judgment No. 13) the Court assessed the damages to be paid by Poland to Germany for the unjustified confiscation of German property in terms of Reichsmark, without discussing the choice of German currency.

²³ Examples in Moore, *Hague Court Reports* (1916) 285 and in n. 23, *supra*.

²⁴ Particularly where the defendant's currency could be considered as stable, *Norwegian Claims* Case between Norway and the United States, Scott, *Hague Court Reports* (2d Series, 1932) 39 (Permanent Court of Arbitration, 1922) (dollars); *Claim of Mme. Chevreau v. United Kingdom*, (1933) 27 *Am. Journ. Int. Law* 153 (arbitrator, 1931) (English pounds). However, the Italian Mexican Claims Commission made its awards in Mexican money, Feller, *op. cit.*, *supra*, 313.

²⁵ Feller, *op. cit.*, *supra*, 313, n. 98.

the contracting powers, residing within its territory, to a national of the opposing power, in terms of the currency of the concerned victorious power, at the pre-war rate,²⁶ and this principle was carried over, by the Treaties, to the assessment of damages by the Mixed Arbitral Tribunals for injury done through exceptional war measures and also in some other situations.²⁷

III. *Foreign Currency Incidental to Agency and Similar Relationships*

Foreign currency is not infrequently an incident in agency and in similar relationships, the agent having, for instance, collected or expended money in foreign currency. In times of fluctuating monetary values, such an occurrence may lead to grave controversies between principal and agent.²⁸ In deciding them, and particularly in commercial cases, one has to look at the manner in which the parties have previously treated foreign money items in their accounts and elsewhere. Where the financial transactions of the parties were conducted on the basis of an account, kept by one party with the express or tacit consent of the other, the currency used in this account should be considered as the money of contract,²⁹ and the method of conversion once agreed upon as to foreign currency items should ordinarily be followed in later cases. If, for instance, the German agent of a French principal by agreement conducts the account in terms of French francs, he cannot be expected to establish an extra pound account in case he receives pounds sterling for his principal; normally

²⁶ *Supra*, p. 296, n. 63.

²⁷ See, e.g., Treaty of Versailles, Part X, art. 297, in connection with art. 298 annex sec. 14(2) and art. 296(d). The Peace Treaty between the United States and Germany of Nov. 11, 1921, 42 Stat. 1939, U.S. Treaty Series No. 658, incorporated by reference Part X of the Versailles Treaty. Accordingly, the American German Mixed Claims Commission awarded damages in terms of United States dollars. See *Decisions of the Mixed Claims Commission, United States and Germany*, *passim*.

²⁸ As to the impact of foreign currency upon commissions and similar rights of the agent, see *supra*, p. 440, n. 12.

²⁹ It is in this sense that the House of Lords held a Turkish bank liable for a sterling payment because the bank had constituted itself a sterling debtor, *Ottoman Bank v. Tebar*, [1928] A.C. 269 (1928).

he may and must credit the principal on the franc account at the rate of exchange on the day of receipt.³⁰

Where no suggestion to the contrary can be obtained from the conduct of the parties, the agent, as a matter of course, must turn over to the principal in the original currency, foreign money received on the principal's behalf.³¹ A loss through depreciation of the foreign currency would fall upon the principal³² who would profit correspondingly from its appreciation. On the other hand the agent has frequently been held entitled to recoup his foreign expenses in the foreign currency.³³ More recently, this rule has been qualified where the parties, at the time of contracting, have been residents of, and payment is to be made within, the jurisdiction.

³⁰ The *Reichsgericht*, May 6, 1933, *Warneyers Rechtsprechung* 1933, 226, held to the contrary, owing to strong indications of a contrary intent of the parties.

³¹ French *Cour de Cassation*, March 9, 1925, *D.H.* 1925, 237. The summary of Appellate Court of Paris, Jan. 29, 1923, *J.D.Int.* 1924, 127, is uninformative. Of course, it is not necessary to transfer to the principal the coins and notes received, *Reichsgericht*, Oct. 28, 1932, *R.G.Z.* 138, 252 at 257, envisaging monetary conditions within the United States. The "local payment rule", *supra*, p. 422, is incompatible with the principal's right to obtain the very currency collected by the agent, but was recognized in this situation by the *Reichsgericht*, Oct. 22, 1924, *R.G.Z.* 109, 85 at 89. The rule set out in the text is also found in *Nickerson v. Soesman*, 98 Mass. 364 (1867), using the rate of exchange rather than the mint par in the assessment of damages for non-delivery of foreign money owed.

A situation analogous to agency relationships arose when after the outbreak of the World War German ships then on voyage had to be sold together with their cargo, by their shippers in neutral ports. The proceeds being paid in the currency of the port, led to conversion problems which resulted in heavy litigation, between shipowners and the consignors. Appellate Court of Hamburg judgments of March 16, 1921, *Hanseatische Gerichtszeitung*, 1921, 133; June 13, 1921, *ibid.* 1921, 201 n. 105; Feb. 6, 1923, *ibid.* 1923, 154; Feb. 26, 1923, *ibid.* 1923, 101; May 2, 1923, *ibid.* 1923, 157.

³² *Re Pearce*, 15 *The Australian Digest 1825-1933* 779 (Fed. Ct. of Bankruptcy, 1933); *Cour de Cassation*, Feb. 17 (13?) 1937, *J.D.Int.* 1937, 766.

³³ *Reichsgericht*, May 8, 1922, *Leipziger Zeitschrift*, 1922, 512. The right to recoup foreign currency was even granted to inland residents, especially to inland forwarding agents who had incurred expenses in their national money for the purchase of foreign money on behalf of their inland customers. *Reichsgericht*, March 17, 1924, *J.W.* 1924, 1590; April 28, 1924, *J.W.* 1924, 1593; Oct. 22, 1924, *R.G.Z.* 109, 85; Supreme Court of Austria, April 26, 1921, 4 *Die Rechtsprechung*, 71; Nov. 21, 1922, 5 *ibid.* 139; April 9, 1924, 6 *ibid.* 251. The "local-payment rule" is inappropriate in this respect also; contrary, however, Supreme Court of Austria, Nov. 21, 1922, *supra*. Expenses incurred by a charterer on behalf of the shipowner were under the common law rule of judicial conversion assessed as of the date when the expenses were made, *Sovereign Shipping Co. v. Chemin de Fer du Midi*, 18 Lloyds L. Rep. 365 (K.B., 1924).

Under those conditions the *Cour de Cassation* and the *Reichsgericht* have deemed the agent entitled only to the equivalent, in national money, of the foreign currency expenses, as of the date when reimbursement was due³⁴ (leaving aside the question of damages for delayed payment).³⁵

The right, if any, of the principal or of the agent to receive foreign currency may be altered by statutory restrictions on dealings in foreign currency. But a prohibition against making contracts in terms of foreign currency should not be deemed to stand in the way of *bona fide* claims for foreign currency, derived from agency relationships. The contrary was held by the French *Cour de Cassation* in a case where a banker had received pounds and dollars abroad on behalf of a customer. The banker was held liable to make payment only in francs, the dollars and pounds being assessed at the time of their collection, although he seems to have kept the foreign money for himself, abusing the confidence of the plaintiff.³⁶ The ruling appears to be an extremely technical application of the monetary prohibition.

IV. Refunds in Foreign Currency and Other Cases

Damages and obligations flowing from agency relationships or agency-like relationships are the major instances of unliquidated debts in which foreign-currency problems appear. Occasionally they develop in other situations also.³⁷ Thus courts have sometimes been concerned with the refund of payments which had depreciated in the hands of the payee or had been converted by him into another currency, the payor claiming refund of the full value furnished by him to the payee. Under Anglo-American law the breach-day rule will probably be used in such cases so that the amount to be

³⁴ *Cour de Cassation*, *supra*, n. 32; *Reichsgericht*, Jan. 27, 1928, *R.G.Z.* 120, 76 at 81.

³⁵ *Supra*, p. 257.

³⁶ Judgment of Jan. 14, 1928, *J.D.Int.* 1928, 691, with critical annotation by Professor Perroud.

³⁷ As to currency problems in salvage of foreign ships, see *The Eisenach*, 54 *Lloyds L. Rep.* 354 (Adm., 1936), *supra*, p. 130, n. 26 and Appellate Court of Hamburg, June 12, 1922, *Hanseatische Gerichtszeitung*, 1922, 855; Feb. 26, 1923, *ibid.* 1923, 166; German Marine Arbitration Tribunal, May 6, 1916, *ibid.* 1917, 97.

refunded will be assessed in the currency of the forum at the rate of the day on which the payee should have reimbursed the payor.³⁸

Leaving aside, however, the rigid conversion rule one should first try to find out if under the circumstances there is conduct from which a tacit guaranty by one party to the other against changes in the monetary value may be implied. For example, a Swiss firm having sold goods to a German for Swiss francs, had the German remit to the Swiss firm's bank their equivalent in marks which soon depreciated. The Swiss authorities having refused the license required by law for the export of the goods, the German rescinded the contract. The Swiss Federal Tribunal held the Swiss firm liable to refund the francs contracted for on the ground that the Swiss firm by its conduct had assumed the risk of the fluctuations of the mark.³⁹ Where there is no such assumption of risk the loss should ordinarily be imposed upon the party responsible for the fact which makes reimbursement necessary,⁴⁰ for instance upon the payee who by mistake made the payor pay too much. Where responsibility cannot be ascertained, refund should be made in the currency and in the amount received by the payee rather than in the currency of the debt which was to be discharged by the payment.⁴¹

³⁸ In *Parker v. Hoppe*, 258 N.Y. 365, 179 N.E. 770 (1932), roubles were to be refunded by the defendant, owing to a rescission of the contract. The court did not decide whether the day of breach or the day of rescission would control, the general language of the decision being in favor of the former theory. The debt was payable in Russia, but there was no reference to Mr. Justice Holmes' day-of-judgment theory. *Supra*, p. 430. The Appellate Court of Brussels, Dec. 19, 1925, 14 *Revue de Droit Maritime Comparé* 159, applied the rate of the day of rescission to the conversion of the money to be refunded.

³⁹ Judgment of July 11, 1923, *Amliche Sammlung*, 49 II 287. Similarly, Court of Cassation of Torino, June 6, 1924, 7 *Revue de Droit Maritime Comparé* 439.

⁴⁰ In this sense Austrian Supreme Court, Sept. 30, 1925, *Die Rechtsprechung*, 1925, 166 no. 165; Appellate Court of Aix, March 22, 1923, 2 *Revue de Droit Maritime Comparé* 582.

⁴¹ The question of overpayment in foreign currency or in discharge of a foreign currency debt has been dealt with, in conflicting decisions, by the Austrian Supreme Court. Where Austrian crowns were paid in discharge of a foreign currency debt, crowns of the amount paid are to be refunded according to the judgment of Nov. 27, 1923, 6 *Die Rechtsprechung* 106; the amount of foreign currency to be discharged was, however, considered as refundable in the judgments of March 26, 1923, 5 *ibid.* 250 and Sept. 30, 1925, *ibid.* 1925, 166, no. 165; similarly the Supreme Court of Czechoslovakia, Nov. 21, 1923, cited by Wahle, 6 *Die Rechtsprechung* 106. Refund of payments in foreign currency was involved in the judgments of Nov. 28, 1922, 5 *Die Rechtsprechung* 137;

In maritime general averages it is a matter of course to have one rate of exchange throughout; the date of the sacrifice has been held decisive by an English court.⁴² This seems to be a sound ruling.

Jan. 8, 1924, 6 *ibid.* 77; Dec. 17, 1924, *ibid.* 1925, 41; Oct. 21, 1925, *ibid.* 1925, 166, no. 164. It seems impossible, however, to derive a consistent line of thought from these cases.

⁴² *Noreuro Traders v. Hardy*, 16 Lloyds L.R. 319 (K.B., 1923). *Reichsgericht*, June 4, 1924, *R.G.Z.* 108, 304 at 307, mainly concerned with other questions, favors the rate of exchange of the date decisive in the distribution of the general averages. Determination of that date is not defined in the opinion.

CHAPTER VIII

DEBTS UNDER EXCHANGE CONTROL

SECTION 37

LOCAL EFFECTS OF EXCHANGE CONTROL

I. *Exchange Control in General*

The most recent phase of monetary development is exchange control,¹ that is, compulsory regulation of foreign exchange and of payments made to and received from abroad. In the hundred years before the World War, the enormous growth in population and the rise in standards of living had been financed largely through international credit transactions by which the wealthier countries, in pursuance of their own economic and political aims, furnished the capital to the poorer countries for the development of their national economies. The World War and its aftermath have destroyed the psychological foundations of this international credit structure. The need for such capital transfers persists, as does the demand for foreign products, but neither is now obtainable in the same manner as formerly. The day of the long-term international credit transaction appears to be past, but the demand for long-term capital has grown with the universal increase in national armaments. Foreign money, as the principal means of payment for foreign products, has thus become, in the great majority of countries, a matter of primary concern in the administration of the national economy.

¹ This term is used in the Anglo-German agreements, *infra*, p. 508, n. 19, translating the German *Devisenbewirtschaftung*. The French term is *régime des devises*. *Devisen*, *dévises*, meant originally foreign bills of exchange and later on foreign money, in the broadest sense of the word. Exchange control is no longer confined to regulation of foreign-exchange transactions. It includes as well restrictions on international payments in the national currency.

Its importance is even greater in countries with unsettled monetary systems. In such countries the moneyed classes seek to protect themselves by converting their holdings of national money into a more stable foreign currency. This "flight of capital" in its various forms is apt to result in panic and so to ruin the national monetary system. Legislative restrictions on foreign exchange speculation, prohibitions upon the export of gold, and similar minor measures have little effect in financial crisis. Under pressure of crisis, governments try to obtain full control of the foreign exchange market, subjecting transactions therein to governmental license and supervision. Even the barring of acquisition of foreign currency, and perhaps of gold, will not serve to prevent the flight of capital. Foreign securities will be bought with national money or other foreign investments made therewith. The legislature will combat these attempts, and control will rise from stage to heightened stage almost automatically.

Such has been the evolution of "exchange control" or compulsory monetary planning in a large number of countries.² The types of control vary greatly in substance and in mode of enforcement (non-enforcement may be the result of policy as well as of weakness).³ Russia and Germany represent the extremes. The Russian situation is characterized by government monopoly of foreign trade, by complete suppression of large scale private inland enterprises, and by a

² Countries under exchange control are listed as of the end of 1937 in League of Nations, "Economic Intelligence Service", (1938) *Monetary Review* 107. At that time exchange control existed in 32 countries and had been abolished in 7 others. The dates of introduction or suppression of exchange control are likewise indicated. See also "Recent tendencies in exchange control", *ibid.* 30. Among the countries still possessing exchange control may be mentioned Chile, Denmark, Germany, Greece, Hungary, Italy, Japan (see v. Spindler, "*Die japanische Devisenbewirtschaftung*", in *Devisenarchiv*, 1938, 425), Mexico, Poland, Roumania, Spain, Turkey, Uruguay, Venezuela, Yugoslavia. For a valuable (though essentially economic) analysis of several important systems of control, see Jullien, *Les Différents Régimes de Contrôle des Changes* (1938).

One has to be aware that in matters of exchange control the written law is not alone to be considered. See next note.

³ "Black markets" of foreign exchange may even be tolerated or encouraged by the authorities. *Monetary Review*, *supra*, 31.

Where a foreign debtor has relied on exchange control to excuse nonpayment, the courts have sometimes rejected the defense on the ground that in other cases he had actually paid no heed to the control. Court of Middelburg (Holland), Jan. 9, 1918, *Weekblad van het Recht*, 1918, no. 10220; Court of Zurich, April 23, 1937, *Nouvelle Revue de Droit Int. Privé*, 1937, 627 at 634.

policy of strict economic seclusion. Few legal questions arise under the Russian control. The German system is much more elaborate legally.⁴ Of the following brief summary of its main features, it should be noted that the duties and prohibitions mentioned are subject to such exceptions as may be allowed by the exchange authorities.

Every German resident, regardless of nationality, is under a duty to deliver to the *Reichsbank*, within three days, all foreign exchange (*Devisen*, including coin, paper money, checks, bills of exchange, etc.) received by him;⁵ he receives in return the officially quoted mark equivalent to the foreign exchange.⁶ German residents may not acquire such foreign exchange with reichsmarks.⁷ Neither foreign exchange nor reichsmarks may be exported⁸ nor may reichsmarks be imported,⁹ the latter measure being designed to destroy "black" foreign trading in unlawfully exported reichsmarks. Similar rules are applied to foreign securities;¹⁰ if acquired before the institution of exchange control (July 16, 1931) they were to be registered with the authorities¹¹ and have since been gradually requisitioned by the *Reichsbank*. German residents may not commingle with securities held for them by a banker,¹² securities belonging to nonresident foreigners, and the banker is prohibited from transferring foreigners' securities on a German resident's account and *vice versa*.¹³ Nor, in general,

⁴ See Hartenstein, *Devisenrecht* (1935); Flad-Berghold-Fabrizius, *Das Neue Devisenrecht* (loose leaf service); Koppe and Blau, *Das Heutige Devisenrecht* (1936); Harris, *Germany's Foreign Indebtedness* (1935); Platier, *Le Contrôle des Dévises dans l'Economie du III^e Reich* (Paris, 1937). The book of Hartenstein, then head of the Exchange Control Administration, is of particular weight. A weekly *Das Devisenarchiv* is especially devoted to discussion of exchange control law, and is accompanied by a supplementary series of monographs (*Schriftenreihe zum Devisenarchiv*).

⁵ Exchange Law (*Gesetz über die Devisenbewirtschaftung*) of Feb. 4, 1935, sec. 35, *R.G.Bl.* 1935 I 105; Decree of Feb. 4, 1935, sec. 1, *R.G.Bl.* 1935 I 114. [While this volume was in press, the law and its amendments were consolidated and reshaped by the Exchange Law of Dec. 12, 1938, *R.G.Bl.* 1938 I 1721. The changes made do not materially affect the present discussion.]

⁶ Exchange Law, secs. 31, 32.

⁷ Exchange Law, sec. 29.

⁸ Exchange Law, sec. 13.

⁹ Decrees of Dec. 1, 1935, *R.G.Bl.* 1935 I 1408, and of May 25, 1936, *R.G.Bl.* 1936 I 467. Regarding the international repercussions of these prohibitions, see *infra*, sec. 38, n. 56.

¹⁰ Exchange Law, sec. 13.

¹¹ Law of June 12, 1933, sec. 1, *R.G.Bl.* 1933 I 360.

¹² Exchange Law, sec. 26(1).

¹³ Exchange Law, sec. 26(3).

may a German resident dispose of debts owed him by foreigners, no matter what currency is involved.¹⁴ These restrictions apply subject to necessary variations to securities held abroad by German residents;¹⁵ the obligation to deliver them to the *Reichsbank*, if required, extends to those securities also.

Moreover, a German resident may not make payments or remittances to or for nonresidents irrespective of whether or not he has funds available abroad¹⁶ nor may he open a credit for a foreigner,¹⁷ because this would diminish the influx of foreign exchange. Foreign creditors of German residents are likewise barred from availing themselves of the proceeds of debts collected by them.¹⁸ They can obtain judgment only after receiving permission from the authorities; payment must ordinarily be made into a "blocked" account in a German bank.¹⁹ Generally speaking, bank accounts of foreign creditors are "blocked". Foreign creditors can make only limited use of their accounts, one important use being to pay for German goods to be exported, and then only up to twenty-five per cent of the price (the remainder of the price must be paid in foreign exchange).²⁰ The uses allowed vary with the nature of the account ("old accounts" established before July 16, 1931; "emigrant accounts"; "standstill accounts";²¹ and many other types).²² Blocked mark accounts are commonly spoken of as "blocked marks"; but it should be borne in mind that there is only one monetary unit in Germany, namely the "mark", or, more accurately, the "reichs-

¹⁴ Exchange Law, secs. 9, 11.

¹⁵ Exchange Law, secs. 9, 21. However, orders by German authorities regarding securities situated abroad, of German nationals, have no *in-rem* effect, *infra*, p. 494.

¹⁶ Exchange Law, secs. 9, 11, 14. *Central Hanover Bank and Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (D.C. S.D. N.Y., 1936), *aff'd* 84 F.(2d) 993 (C.C.A. 2d, 1936); *cert. denied*, 299 U.S. 585 (1936), is partly based on an erroneous assumption to the contrary.

¹⁷ Exchange Law, sec. 14.

¹⁸ Exchange Law, secs. 11, 15-20.

¹⁹ Exchange Law, sec. 39. *Infra*, p. 483.

²⁰ These provisions are constantly changing. A tabulation of the state of the law in 1937 may be found in Piatier, *op. cit. supra*, n. 4, at 160.

²¹ *Infra*, p. 507.

²² They are defined by the Regulations (*Richtlinien*) for the control of foreign exchange of Dec. 19, 1936, c. 1, sec. 1, *R.G.Bl.* 1936 I 1021 (*Regulations 1936*).

mark".²³ Blocked accounts are salable only after special permission is received.²⁴ Such transfers are made at a very heavy discount which, varying with the nature of the account, averaging from 80-94 per cent and even more at the present time (latter part of 1938), leaving the owner only a small fraction of the nominal value. Within Germany conversion of foreign money and securities must always be made in accordance with the German fiat quotations,²⁵ the reichsmark being still valued on this score at its 1924 gold parity, so that 1 reichsmark is allegedly worth 40.33 cents of the present dollar. Elaborate schemes of preference exist for the transfer of interest, dividends and other proceeds from foreign investments blocked in Germany.²⁶ Their financial effect, however, is not great.²⁷ It is only by international agreement that certain groups of foreign creditors, such as the "standstill creditors", have obtained more favorable terms.²⁸

The basis of the present legal set-up (1938) is the Exchange Law (*Gesetz über Devisenbewirtschaftung*) of February 4, 1935,²⁹ which is supplemented and partly amended by more than 200 "regulations" (*Richtlinien*)³⁰ of the "Reich Exchange Board" (*Reichsdevisenstelle*), likewise having the force of law.³¹ This board carried on its work of amendment and elaboration of the law through "*Runderlasse*" (releases) which number many hundreds.³² In 1938 the functions of the

²³ See 38 Op. Att. Gen. 489 at 496 (1936).

²⁴ *Regulations* 1936, c. 2, secs. 50-58.

²⁵ Exchange Law, sec. 31.

²⁶ Law of June 9, 1933, concerning foreign indebtedness (Transfer Law), *R.G.Bl.* 1933 I 349. Payment of such items is to be made to the *Deutschen Konversionskasse für Auslandsschulden* (Conversion Office). The Exchange Offices are under a duty to permit the German debtor to make payment to the Conversion Office. The payments discharge the debt, Transfer Law, sec. 1. On certain transactions of the Conversion Office, see *infra*, p. 506, n. 7. The major documents concerning the Conversion Office are collected and translated in Foreign Bondholders' Protective Council, *Annual Report*, 1936, p. 469 *et seq.*; 1937, p. 417 *et seq.*

²⁷ The *Golddiscontbank*, a subsidiary of the *Reichsbank*, maintains bids at a fraction of the nominal value for the "scrips" (bonds with no fixed time of redemption) issued by the *Konversionskasse*, thereby dictating the price. The scrips have been guaranteed for a limited period by the German government. Flad-Bergholz-Fabrizius, *op. cit.*, n. 4, at C 23. Generally, the creditor will receive hereby 20 per cent of his claim.

²⁸ Platier, l. c. at 92-97; Hartenstein, *Devisennotrecht* (1935) 38.

²⁹ *Supra*, n. 5.

³⁰ *Supra*, n. 22.

³¹ Exchange Law, sec. 2(2).

³² They are partly published in the *Devisenarchiv*, *supra*, n. 4.

Reichsdevisenstelle were taken over by the Ministry of National Economy. The whole matter is in a constant state of flux. So complicated are the regulations that they have made necessary the creation by the government of the novel profession of "exchange counsel" (*Devisenberater*) which is the subject of elaborate regulation.³³

The law of exchange control is enforced with the utmost severity.³⁴ "In particularly grave cases", violation of exchange control regulations may be and is punished by the ordinary law courts with as much as ten years' penal servitude.³⁵ For "grave damage to the national economy" resulting from "gross selfishness or other lowly reasons in shifting, or leaving assets abroad", the death sentence may be inflicted.³⁶

A tremendous administrative machinery for the permanent control of actual or prospective transactions in foreign exchange or with foreigners has been established. In addition to the Exchange Offices (*Devisenstellen*) which are charged with the task of passing on applications for the numerous permits required by law, there are Offices of Supervision (*Ueberwachungsstellen*) concerned chiefly with distribution of foreign exchange for import purposes.³⁷ Other agencies of "supervision" in the proper sense of the word also exist, among them the banks which under a fascist regime are necessarily semi-public institutions with a very important supervisory role. The authorities have the power to take and to direct any measures "which are necessary for the safeguarding of foreign-exchange holdings".³⁸ No habeas corpus or other civil

³³ Decree of June 29, 1936, *R.G.Bl.* 1936 I 524.

³⁴ Exchange Law, sec. 42. Sec. 44, it is true, contains a certain qualification of the rule that everybody is supposed to know the criminal law.

³⁵ Exchange Law, sec. 42.

³⁶ Law against Sabotage of National Economy of Dec. 1, 1936, *R.G.Bl.* 1936 I 999. Jurisdiction is vested in the People's Court, an institution similar to a court martial, proceeding secretly and rendering decisions from which there is no appeal. Law of April 24, 1934, Art. III, *R.G.Bl.* 1934 I 341, 345; Decree of June 12, 1934, *R.G.Bl.* 1934 I 492; Law of April 18, 1936, *R.G.Bl.* 1936 I 369. See Ermarth, *The New Germany* (1936) 58.

³⁷ According to Piatier, *op. cit. supra*, n. 4 at 36, the Berlin *Devisenstelle* in 1937 had more than 500 employees, without counting mechanical employees.

³⁸ Exchange Law, sec. 37b (1936), describing the functions of the former *Reichsdevisenstelle* which have been taken over by the Ministry of National Economy. Law of April 9, 1938, *R.G.Bl.* 1938 I 376.

rights impede them. They may search, seize and arrest. But this is a common, even a fundamental feature of fascist government.

Of course, compulsory monetary planning as such is not peculiar to fascist or communist polity.³⁹ In Germany it was inaugurated in a rather comprehensive manner by the Bruening government in 1931.⁴⁰ It is natural to fascism, however, in that it is anti-democratic and anti-liberal.⁴¹ It is in that sense that an unbalanced budget, ultimately entailing compulsory monetary planning, holds danger for civil liberties.

In the United States, powers to regulate transactions in foreign exchange were conferred upon the President in 1917, after the United States had entered the war.⁴² By Act of March 9, 1933,⁴³ the President was empowered "through any agency that he may designate, or otherwise, to investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person engaged in any transaction referred to in this subdivision to furnish under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers in connection therewith in the custody or control of such person, either before or after such transaction is completed." Violations are punishable by fine up to \$10,000 and ten years' im-

³⁹ See sec. 37, n. 2, *supra*. See also Jullien, *op. cit. supra*, n. 2, at 49.

⁴⁰ Decrees of July 15, 1931, *R.G.Bl.* 1931 I 366; July 18, 1931, *R.G.Bl.* 1931 I 373; July 21, 1931, *R.G.Bl.* 1931 I 387.

⁴¹ It is significant that Brazil by a law of Dec. 23, 1937, (no. 97) instituted a rigid exchange control immediately after her adoption of a dictatorial form of government. On the other hand, the French law of June 30, 1937 (*D.P.* 1937 IV 137, tr. 1937 *Federal Reserve Bulletin* 720) authorizing the government to rule by decree for two months, expressly denied it the power to set up an exchange control. This question had been the crux of the cabinet crisis of June, 1937 (see the annotation *D.P.* 1937 IV 137), partly because of the Tripartite Monetary Agreement, *supra*, pp. 157, 188, the functioning of which presupposes the absence of exchange control.

⁴² Act of October 6, 1917, sec. 5(b), 40 Stat. 411 at 415, as amended by Act of Sept. 24, 1918, sec. 5, 40 Stat. 965 at 966, 50 U.S.C.A. App. 5.

⁴³ 48 Stat. 1, Art. I, sec. 2, 12 U.S.C. 95a.

prisonment, or both. Using these powers, the President, by Executive Order of January 15, 1934,⁴⁴ required foreign-exchange transactions to be licensed by the Secretary of the Treasury, except where entered into in pursuance of normal commercial or business requirements and reasonable traveling and other expenses. On November 12, 1934, a general license was published by the Secretary,⁴⁵ so that at present, full freedom to trade in foreign exchange has been re-established in the United States. The President has his powers, however, and may some day use them. The problem of their constitutionality will, then, certainly be raised. The President may subject the whole of the country's foreign commercial and financial relationships to governmental control; and may place export and import trade completely under the thumb of government. No standards for the exercise of those broad powers have been provided by Congress, and the 1935 rulings of the Supreme Court,⁴⁶ make it unlikely that the Court would sustain such an inordinate delegation of legislative powers.

II. Local Effects of Exchange Control Upon Debts ⁴⁷

Broadly speaking, exchange control merely aims to disburden the national economy and for that purpose to excuse the debtor from the duty to transfer money abroad by buying foreign exchange.⁴⁸ The debtor is not released

⁴⁴ No. 6560, 12 U.S.C. 95 note.

⁴⁵ 1934 *Federal Reserve Bulletin* 780. The grant is made subject to the proviso that the transaction be "not prohibited by any other order", but this reservation, which perhaps refers to foreign gold coin (*supra*, p. 70, n. 41) seems to be superfluous. By another provision all dealers whose transactions in foreign exchange exceed \$5,000 per week are required to furnish reports to their Federal Reserve Bank. Thus the Federal Reserve System, and thereby the government is enabled to follow developments in foreign exchange dealings.

⁴⁶ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Co. v. U. S.*, 295 U.S. 495 (1935).

⁴⁷ For a general discussion of this problem, see Lenhoff, *Privatrechtliche Probleme des Devisennotrechts* (1932); Wahle, *Beiträge zum Devisenrecht* (1933); Blau, "Devisenrecht und Privatrecht", (1933) 83 *Jhering's Jahrbücher für die Dogmatik des bürgerlichen Rechts* 201; Casparius, "Ungelöste Fragen der deutschen Devisengesetzgebung", (1936) 86 *ibid.* 33; Ascarelli, "Controllo sulle divise e debiti di moneta estera", *R.D. Comm.* 1936 I 195.

⁴⁸ Transactions contrary to exchange control regulations are void, *Reichsgericht*, March 16, 1920, *R.G.Z.* 98, 254; Nov. 19, 1920, *ibid.* 100, 237, and other decisions of the same court; Court of Cassation of Torino, May 2, 1923, *Foro Italiano*, 1923 I 656; Supreme Court of Czechoslovakia, March 28, 1922, cited by Wahle in 6 *Die Rechtsprechung* 126. It

from his obligations to his foreign creditor, nor does he cease to owe foreign exchange.⁴⁹ If the debtor is not allowed to pay abroad or to pay in foreign currency, he will ordinarily be permitted by the exchange authorities to pay within the regulating country in its national money. He is under a duty at his own expense⁵⁰ to take appropriate steps to obtain the permits necessary for the discharge of his obligation. As a German Appellate Court put it, he must exhaust all the avenues of exchange control regulation in order to satisfy the creditor.⁵¹ The creditor may bring suit against him in the local courts; the several systems of regulation differ in that some require the consent of the authorities before the foreign creditor may obtain judgment⁵² while others require such consent only for the compulsory execution of the judgment.⁵³ The creditor will normally receive payment in a "blocked account". Although the term "transfer moratorium" is frequently used to describe the resulting situation, there is, in law, no moratorium. In the absence of special provisions to that effect, the court is without power to grant the debtor extra time in which to pay. To the extent that transfer is delayed or prohibited there is not, as in an ordinary moratorium, a privilege in the debtor which he may use or not,

is surprising that the Austrian Supreme Court has long taken the contrary view. Judgments of Dec. 19, 1923, 6 *Die Rechtsprechung* 56; Feb. 10, 1925, *ibid.* 1925, 85; Feb. 12, 1936, *Juristische Blätter*, 1936, 176, here cited from *Die Rechtsprechung*, 1937, 82. Later, however, the court adopted the invalidity rule, judgment of Oct. 13, 1937, *Die Rechtsprechung*, 1937, 200. The latter is expressly set out in the German Exchange Law sec. 38.

⁴⁹ Italian Court of Cassation, Jan. 16, 1933, *Settimana della Casazione*, 1933, 262; Appellate Court of Milan, Nov. 26, 1937, *Foro Italiano*, 1938 I 273 at 277 (no impossibility defense).

⁵⁰ Lengemann, "*Kaufvertrag und Devisenrecht*" (*Schriftenreihe zum Devisenrecht*, Heft 3) 13.

⁵¹ Appellate Court of Naumburg, undated, *Devisenarchiv* 1936, 364.

⁵² German Exchange Law, sec. 39; Austrian Supreme Court, March 5, 1936, *Die Rechtsprechung*, 1936, 64 (Austrian law) and Sept. 5, 1934, *ibid.* 1934, 178 (referring to Hungarian law).

⁵³ Supreme Court of Czechoslovakia, Nov. 3, 1933, and June 14, 1934, *Z.A.J.P.* 1936, 174; Appellate Court of Trieste, Jan. 7, 1937, *R.D. Comm.* 1937 II 547; App. Court of Milan, Nov. 26, 1937, *Foro Italiano*, 1938 I 273. From the Trieste judgment it appears that lire may be collected by the Italian sheriff, on behalf of the foreign creditor, even without a permit from the exchange authorities. The Milan case seems to indicate that judgment may be rendered against an Italian debtor for payment of foreign money from funds held by him abroad if freely available to him under Italian law.

but a prohibition in the public interest, that he cannot waive.⁵⁴ And this prohibition is permanent, not a mere respite such as resulting from a moratorium.

Payment in foreign currency is forbidden under exchange control, even if the creditor is not a foreigner, and the domestic creditor's chances of obtaining an exemption are generally almost zero where the shortage of foreign exchange is severe. However, a debtor obligated in terms of foreign currency, whether obligated or not "effectively", that is, to the exclusion of the local-payment rule,⁵⁵ remains a debtor, and the creditor is entitled at least to the equivalent, in local currency.⁵⁶ Conversion will be made at the fiat rate,⁵⁷ and a foreign creditor will receive payment in a blocked account. For these reasons, a foreign seller of goods is entitled to rescind a contract still executory when exchange control was introduced.⁵⁸ Even where rescission is no longer permitted by law or has not been made by the seller he is, in general, under no duty to accept payment on a blocked account. In this connection German courts have advanced the theory that the debtor's inability to furnish foreign exchange because of exchange control, is only "temporary". In the opinion of the *Reichsgericht*, the creditor, asserting his contractual right, cannot be compelled to receive reichsmarks

⁵⁴ There is in German, and partly in non-German legal writings of German language, lengthy discussion of whether exchange control regulation does or does not belong to the province of "substantive law" rather than of procedural law. The question, raised and expounded particularly by Dietrich in *Deutsche Justiz*, 1935, 785 at 786; (1935) 34 *Bankarchiv* 516, should be answered affirmatively, but is essentially conceptualistic in nature. Its confusing character appears in the suretyship cases, *infra*, sec. 38 n. 60 and 64.

⁵⁵ *Supra*, p. 423.

⁵⁶ See *Reichsgericht*, Dec. 11, 1919, *J.W.* 1920, 373; March 17, 1924, *J.W.* 1924, 1590; Jan. 29, 1937, *Warneyers Rechtsprechung*, 1937, 98. In the latter case, choice of German currency is presumed, in an arbitrary way, from the intent of the parties. *Cf.* also judgment of Oct. 24, 1923, *J.W.* 1924, 1518. The Austrian Supreme Court, judgments of Feb. 8, 1933, *J.W.* 1933, 1687, and the Appellate Court of Florence, July 13, 1937, *Foro Italiano*, 1937 I 1124, too, have adopted the above mentioned rule.

⁵⁷ This is true even where the central note institute of the country charges a higher rate to licensed purchasers of foreign exchange, Appellate Court of Bucharest, May 28, 1936, on a suit brought by the *Société Continentale de Bâle*; see Penciulesco, *La Monnaie de Paiement dans les Contrats Internationaux* (thesis Paris, 1937) 298, 301.

⁵⁸ Austrian Supreme Court, judgment of April 10, 1935, *Die Rechtsprechung*, 1935, 122. *A fortiori*, the right to rescission will be recognized outside the regulating state. Supreme Court of Czechoslovakia, Feb. 6, 1937, *Prager Archiv*, 1937, 1449, in respect to the newly created exchange control of Yugoslavia.

in lieu of the currency contracted for except where good faith would require him to do so. In case he does not agree to payment in reichsmarks, the debt remains existent, and contractual interest must continue to be paid.⁵⁹ The debtor is not deemed to be in default (in "*mora*"),⁶⁰ and therefore is not liable for damages, since from the viewpoint of his domestic law, he is not responsible for the nonpayment of foreign currency. Under a German act of 1937 interest due by him must not exceed four per cent.⁶¹ The rulings of the German courts appear to be sound in so far as mere exchange control does not obligate the foreign creditor to accept a currency he had not contracted for.

As is apparent, exchange control is by no means restricted to the national territory. Being primarily directed against creditors residing abroad, and also affecting debtors residing abroad and assets held abroad by inland residents and nationals it offers a modern type of legislation which is thoroughly extraterritorial and still, at the same time, thoroughly non-international.⁶² Collisions with other jurisdictions necessarily result. Exchange control therefore constitutes a novel and important chapter of "conflict-of-laws".⁶³

III. Contracting Under Exchange Control

The legal incidents of import and export contracts, and of other foreign transactions have been profoundly altered by exchange control, and regard to these alterations is now required of those outside the regulating state who participate in such arrangements. For damage because of failure

⁵⁹ *Reichsgericht*, March 16, 1936, *R.G.Z.* 151, 35; May 23, 1936 (Great Senate), *R.G.Z.* 151, 116; Feb. 22, 1937, *R.G.Z.* 153, 384. Accord: Austrian Supreme Court, Feb. 8, 1933, *J.W.* 1933, 1687, and April 10, 1935, *Die Rechtsprechung*, 1935, 122. These rules, however, under German law do not apply to the payment of interest, dividends and similar dues to the *Konversionskasse*. Payment into this bank amounts to a discharge of the debt, *supra*, p. 479, n. 26. The English *Debts Clearings Offices and Import Restriction Act*, 1934 (*infra*, p. 506) provides that payment to the English Clearing office operates as a discharge of the debt. (Art. I(3)). That Act, however, was planned as a retaliatory measure.

⁶⁰ *Supra*, p. 233. Concerning payments delayed by foreign exchange control, see *infra*, p. 493, and by the interposition of a clearing treaty, *infra*, p. 512.

⁶¹ Law of May 27, 1937, sec. 4(3), *R.G.Bl.* 1937 I 600.

⁶² That foreign law is the law of the contract is, of course, no hindrance to application of local exchange control. Austrian Supreme Court, May 5, 1933, *Die Rechtsprechung*, 1933, 106.

⁶³ *Infra*, sec. 38.

to do so, the courts of the regulating state will almost certainly refuse to grant redress, nor will they permit defenses based on ignorance, except perhaps for misrepresentations or other extenuating circumstances. The foreigner may not fare much better in the courts of his own country. The existence of exchange control regulation is so widespread that under present conditions everybody who contracts with residents of another country is supposed to be forewarned.

The basic fact is simple. The validity, or at least the effectiveness of each import or export or other international transaction concluded with a person subject to exchange control will depend on the more or less arbitrary consent of the exchange authorities. It is implied in the making of the contract that the consent will be granted. In the great majority of cases special provisions adapt the form of the contract to the rigors of exchange control. A recent German study⁶⁴ gives the following customary or suggested provisions: "The transaction becomes effective when the exchange permit (*Devisenbescheinigung*) is granted" "The goods are not to be delivered or called for until the exchange permit is granted" "The contract expires if the exchange permit is not granted by May 1, 1938" (a frequent and useful clause); "There is no liability, even in the case of negligence, for the fact that the exchange permit may be denied or delayed or that notice thereof may be omitted" (a clause obviously objectionable from the exporter's viewpoint); "The importer may rescind the contract for serious reasons resulting from the particulars of the exchange permit" (as where the permit imposes upon the importer unpredictable duties such as a specific use of the goods). In many cases the parties will first submit to the exchange authorities a preliminary draft agreement in order to obtain a decision which may be made the basis for a binding agreement. Similar practices will probably also develop in other countries exercising exchange control.

⁶⁴ Lengemann, "Kaufvertrag und Devisenrecht" (*Schriftenreihe zum Devisenarchiv, Heft 3*, undated, probably 1937). Sometimes the German authorities allowed a kind of barter transaction (*Kompensationsgeschäfte*) which has, however, recently lost much in importance. For a discussion of its legal aspects, see Schlesinger, "Privatrechtliche Probleme bei internationalen Waren-Verrechnungsgeschäften", (1935) 32 *Schweizerische Juristenzeitung* 37.

Bills of exchange drawn on a country under exchange control are almost an anachronism. The general rules of exchange control apply to the payment of such bills, which under some exchange control laws may be discharged by payment into a blocked account. The drawee retains the bill and the last holder who has actually not been paid will be unable to proceed against prior holders.⁶⁵

SECTION 38

EFFECT IN FOREIGN COUNTRIES OF EXCHANGE CONTROL

I. *Non-Recognition of Exchange Control—Public Policy*¹

(a) The problem of the effects outside the regulating state of foreign exchange regulation is of growing importance. Apart from very special situations,² the various jurisdictions confronted with this problem have been practically unanimous in refusing to apply foreign exchange control enactments.

The reasons given vary. Some courts have set forth the theory that exchange control is "territorial" in nature and therefore inapplicable outside the regulating state.³ The concept of "territoriality" (in the writer's opinion, one of the most cryptic and confusing in the doctrine of conflict of laws⁴) is especially inappropriate if applied to exchange control which, as was seen, is extraterritorial to the utmost.

⁶⁵ In case the drawee refuses payment, exchange control does not bar protest. German Regulations 1936, c. 2, no. 9d. For a general discussion of the bill of exchange problems under exchange control, see Wegelin, "*Devisenzwangswirtschaft, Kursschwankungen und Wechselgeschäft der Banken*" in *Zeitschrift für Schweizerisches Recht*, 1932, 257.

¹ See Comment "Foreign exchange restrictions and the conflict of laws", (1938) 47 *Yale L.J.* 451; Domke, "*La législation allemande sur les devises en droit int. privé*", *J.D.Int.* 1937, 226 and (*Nouveaux aspects, etc.*) 990; Mezger, "*Les mesures du contrôle des changes et les principes du conflit des lois*", *Nouvelle Revue de Droit Int. Privé*, 1937, 527; R. Neumann, *Devisennotrecht und Internationales Privatrecht* (Bern, 1938).

² *Infra*, p. 496, *et seq.*

³ Appellate Court of Paris, June 30, 1933, *J.D.Int.* 1933, 963; Appellate Court of Colmar, Feb. 16, 1937, *J.D.Int.* 1937, 784; *Reichsgericht*, Oct. 3, 1923, *R.G.Z.* 108, 241; June 27, 1928, *ibid.* 121, 337 at 344; Austrian Supreme Court, Sept. 5, 1934, *Die Rechtsprechung*, 1934, 178; City Court of Oslo, Feb. 13, 1936, *Bull. I.I.I.*, 34, 284. *Cf.* also Austrian Supreme Court, Feb. 20, 1934, *Die Rechtsprechung*, 1934, 42. The term "territorial" is used only in the French judgments.

⁴ For examples, see *supra*, pp. 52, 341, 392, n. 49.

Again, civil-law courts, aiming at the same result, have relied on the theory that foreign exchange control forms part of foreign "public law".⁵ Although exchange control is largely, perhaps mostly, a matter of "public law" (namely administrative law), it has important effects on the law of contracts, and with these very alterations foreign courts are concerned.⁶ Moreover there is no plausible reason why a court in a situation governed by foreign law should shrink from using the "public law" provisions of the applicable legal system.

The proper explanation for the attitude of the courts is that foreign exchange control is repugnant to the public policy (*ordre public*) of the forum.⁷ This is particularly true of

⁵ Swiss Federal Tribunal, Sept. 18, 1934, *Amtliche Sammlung* 60 II 294; City Court of Oslo, cited in n. 3, and a number of decisions of Swiss and Austrian courts listed by Neumann, *supra*, n. 1, at 3, n. 3. The Swiss Federal Tribunal, however, uses primarily the public-policy (*ordre public*) concept, *infra*, n. 7.

⁶ Thus expressly: Austrian Supreme Court, Great Senate, Opinion of Nov. 26, 1935; *J.D.Int.* 1936, 442 and 717. The controversy is probably uninteresting to the common law jurist. *Supra*, p. 35.

⁷ The public policy notion, in one phraseology or another, is employed in numerous cases discarding foreign exchange control legislation. *Reichsgericht*, Oct. 3, 1923, *R.G.Z.* 108, 241, discussed *infra*, p. 496; Appellate Court of Berlin (*Kammergericht*), Oct. 27, 1932, *J.W.* 1932, 3773; Italian Court of Cassation, July 30, 1937, *Foro Italiano*, 1937 I 1203; Swiss Federal Tribunal, Sept. 18, 1934, *Amtliche Sammlung* 60 II 294; Oct. 8, 1935, *ibid.* 61 II 242; Feb. 19, 1936, *ibid.*, 62 II 108; Sept. 21, 1937, *ibid.* 63 II 303; Appellate Court of Colmar, March 11, 1938, *Revue Juridique d'Alsace et de Lorraine*, 1938, 511, pointing to the "*caractère fiscal, monétaire et politique*" of the German exchange control laws; Court of Amsterdam, March 22, 1935, *Nederland'sche Jurisprudentie*, 1935, 590; Court of Rotterdam, March 30, 1937, *ibid.* 1938, 686; *Glynn v. United Steel Works Corp.*, 160 Misc. 405, 289 N.Y. Supp. 1037 (1935). The German cases deal with Russian and Hungarian exchange control. The Austrian Supreme Court at times advanced theoretical reservations against the use of the public policy concept. Thus the judgment of June 12, 1934, *Die Rechtsprechung* 1934, 222, holds that a German debtor was excused because of impossibility caused by his national legislation from making payment abroad, but erroneously interpreted the German legislation as not prohibiting payments out of funds held outside of Germany, so German exchange control was eliminated by another method. A judgment of the same court of September 25, 1934, *ibid.* 1934, 206, would respect Hungarian exchange control in case of reciprocity, but stated that reciprocity did not exist. A sweeping non-recognition rule, however, was laid down in the judgment of Dec. 10, 1935, *Die Rechtsprechung*, 1936, 22. See also Wahle, "*Die Wirksamkeit ausländischer Devisensperren nach österreichischem Recht*" in *Z.A.I.P.* 1935, 779.

Boucher v. Lawson, Cas. Temp. Hardwicke 85 and 194, 95 Eng. Rep. 53 & 125 (K.B., 1735), refusing for reasons of public policy to apply a Portuguese law prohibiting export of gold may be mentioned, as an early predecessor of this group of "public policy" cases. The "territoriality" theory, *supra*, n. 3, though more rigid, is very close to the public-policy doctrine.

the transfer prohibition⁸ which constitutes a one-sided and permanent disruption of creditor-debtor relationships as well as a discrimination first between domestic creditors who remain entitled to contractual payment, and creditors residing abroad, and second within the latter group of creditors, since the exchange control authorities may allow satisfaction of creditor A and disallow satisfaction of creditor B.⁹ The prohibiting country is probably in a state of emergency, but this does not make one-sided measures more acceptable to other sovereign communities injured thereby. Moreover, by instituting exchange control, a government may direct funds otherwise available for payment of debts to other purposes, economic or non-economic, which may jeopardize the creditor country.¹⁰ The Swiss Federal Tribunal outspokenly denounced German exchange-control as "detrimental to Swiss national economy",¹¹ and as a "spoliative" encroachment upon creditors' rights. In a recent decision elaborating that viewpoint the Court makes it clear that it is not actuated by a general notion of "inviolable" vested right,¹² but by the discriminatory nature of the German law. The same, of course, is true of non-German exchange control involving transfer prohibitions.

As in the gold clause situation the unfavorable attitude of the Courts will not be influenced by the fact that the forum itself possesses an exchange control. Public policy is one-sided and self-motivated. There is neither inconsistency nor

⁸ The term "transfer moratorium" is inaccurate, *supra*, p. 483.

⁹ The preamble to the Anglo-German Transfer Agreement of July 4, 1934, Command Papers 4640, emphasized among other things the desire of both governments that the trade and financial relations between the two countries should continue on a *non-discriminatory* [the italics are the writer's] and most friendly basis. The Anglo-German Payment Agreement of Nov. 1, 1934, [1935] Treaty Series No. 26, explicitly refers to the motivation given in the preamble of the Transfer Agreement.

In the *Glynn* case, cited in n. 7, the court, however, seems to assume that the German law purported to discriminate against creditors of American *nationality* as such. That assumption would be erroneous. *Supra*, pp. 477, 478.

¹⁰ Exchange control will serve, for example, to alter the trade balance in favor of the country instituting the control. This point also is indicated by the preamble of the Anglo-German Transfer Agreement.

¹¹ Judgment of Oct. 8, 1935, *Amtlliche Sammlung* 61 II 242 at 248.

¹² Dietrich, J.W. 1935, 3504, had asserted that the Swiss Court was misled by this erroneous notion. There is no basis for Dietrich's assertion, nor does he mention the German cases which are in line with the Swiss ones. He likewise does not disclose the extent to which the latter are supported by other foreign cases.

hypocrisy in the fact that a court will not carry out foreign measures injurious to the forum although the forum has enacted, or may in the future enact, similar measures, injurious to others. No moral or ethical stricture is involved in the public policy concept; all that is involved is that where public policies collide, the court will apply the policy of the forum rather than any other.¹³

The fact that common law courts are reluctant to make outspoken use of the public policy concept appears also where they deal with exchange control. Nevertheless, the American courts have invariably refused to allow the foreign debtor to rely on the exchange control legislation of his country. The rulings are usually based on the fact present in the great majority of the cases, that the foreign debtor had promised to make payment in America. The courts have strained to apply American and to eliminate the foreign, usually, German law.¹⁴ But even under American law the question arises

¹³ One sometimes encounters misconceptions of this aspect of "public policy". The Appellate Court of Brussels, Feb. 4, 1936, *Pasicrisie Belge*, 1936 II 52, *Sirey* 1937 IV 1, *aff'd* by the Belgian *Cour de Cassation*, Feb. 24, 1938, *Bull. I.I.I.* 39, 105, in recognizing the American Joint Resolution in favor of a Belgian debtor, observed that Belgium had herself interfered with gold clauses. But it does not follow that the Belgian courts would refrain from the use of the public policy concept for the protection of Belgian interests against injurious foreign legislation even though Belgium had not enacted similar laws. The problem involved is touched upon also in Swiss Federal Tribunal, Feb. 1, 1938, *Amliche Sammlung* 64 II 88 at 101.

An American case is remarkable. In *Goodman v. Deutsch-Atlantische Telegraphen Ges.*, 166 Misc. 509, 2 N.Y. Supp. (2d) 80 (1938), the court declined to resort to the public-policy argument, since it was "not necessary to assume the pharisaical posture and thank Providence we are not like other people". Nevertheless the court rejected the defendant's answer based on German exchange control. Although the contract expressly provided that the defendant's obligations were "covered" by German law the Court felt that "covered" is not "governed", and that they were "governed" by American law. For this reason, the Court brushed aside German exchange control legislation. Invocation of public policy would have been far preferable to this kind of reasoning.

¹⁴ *Central Hanover Bank and Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (D.C. S.D. N.Y., 1936), *aff'd* 84 F.(2d) 993 (C.C.A. 2d, 1936), *cert. denied* 299 U.S. 585 (1936); *Perry v. North German Lloyd*, 150 Misc. 73, 268 N.Y. Supp. 525 (1934); *Glynn v. United Steel Works Co.*, 160 Misc. 405, 289 N.Y. Supp. 1037 (1935); *Marks v. United Steel Works*, 160 Misc. 678, 289 N.Y. Supp. 1035 (1935); *Sheppard v. Hamburg-Amerikanische-Paketfahrt Actiengesellschaft*, N.Y.L.J. of March 14, 1934, p. 1232, *aff'd* N.Y.L.J., April 6, 1934, p. 1653 (App. Term), *leave to appeal denied* by App. Div., see *Glynn v. United Steel Works* at 409; *Deutsch v. Gutehoffnungshütte*, 168 Misc. 872, 6 N.Y.S. (2d) 319 (1938).

Marley v. Nat. Bank of Greece, 20 F. Supp. 214 (D.C. S.D. N.Y., 1937), and *Society Milion Athena v. Nat. Bank of Greece*, 166 Misc. 190, 2 N.Y. Supp. (2d) 155 (1938), are concerned with efforts by American creditors of Greek banks to recover their blocked accounts.

whether the debtor is exonerated because of the impossibility of performance caused by exchange control. The question has been negatived on the ground that impossibility of performance, due to change of foreign law, is no excuse.¹⁵ That holding is questionable,¹⁶ and if it be right, is nothing but a special application of the public-policy doctrine which can stand on its own feet.¹⁷

In some cases, where the place of performance was deemed to be Holland the Court rendered judgment against the German defendant because under Dutch law a prohibition against payment imposed upon the debtor by non-Dutch law, does not constitute a good defense of *vis major*.¹⁸ There are further grounds justifying that adjudication.¹⁹ American public policy would also be a proper ground, except in the absence of a sufficient American interest in the situation.²⁰

(b) We have so far considered the general attitude of courts towards foreign exchange control, regardless of the type of claims involved. As regards those types, what is demanded by the plaintiff and granted by the court in the great majority of cases is of course payment of the debt by the foreign debtor. Owing to the use of the public policy concept

¹⁵ See the *Central Hanover Bank* case, cited in the preceding footnote.

¹⁶ In the *Central Hanover Bank* case, the court refers to the theory, advanced by Williston on *Contracts*, secs. 1938, 1951-1953, according to which the debtor is excused when the change in foreign law has destroyed the means of performance fixed by the contract or the means of performance contemplated by the parties. See *Earn Line S. S. Co. v. Sutherland S. S. Co.*, 254 Fed. 126 (D.C. S.D. N.Y., 1918). The court considers this theory inapplicable on the erroneous assumption that the debtors might have been able to make payment out of funds held abroad. See, however, the discussion, *supra*, p. 478, on the extraterritorial scope of exchange control. This reveals the inadequacy of the Court's theory.

¹⁷ In this connection it may be mentioned that the American Secretary of State in 1934 had strongly protested German exchange control legislation. *Infra*, p. 506, n. 6. For a general discussion of the public policy concept from the American point of view, see Beale, *A Treatise on the Conflict of Laws*, (1935), sec. 612.1.

¹⁸ *Lann v. United Steel Works Corporation*, 166 Misc. 465, 1 N.Y. Supp. (2d) 951 (1938), *Pan-American Securities Corp. v. Friedrich Krupp Aktiengesellschaft*, 6 N.Y.S. (2d) 993.

¹⁹ In the *Lann* case bonds of a 1926 loan of the *Vereinigte Stahlwerke* were involved. The company had called these in for redemption only to rely subsequently on the impossibility defense derived from German exchange control. Passing on the same loan the Court of Rotterdam, July 6, 1938, *Nederland'sche Jurisprudentie*, 1938, 1242, held that under the circumstances the impossibility defense was made in bad faith and that the company was estopped from bringing it.

²⁰ *Infra*, p. 496.

or of a kindred device the creditor may even obtain a favorable judgment outside his own country. Thus the City Court of Oslo in disregard of German exchange control legislation allowed an attachment by a Dutch creditor of a debt owed by a Norwegian resident to a German, despite the fact that the attached debt was governed by German law.²¹

In opposition to judgments ordering payment in the teeth of foreign exchange control it has been said that by holding the foreign debtor liable to payment, courts compel him to offend the exchange control laws of his own country, and that the "impossibility" of payment imposed upon the debtor by those laws should be respected.²² Whatever validity the objection may have in other situations involving foreign exchange control,²³ it is inoperative where mere payment is asked of the foreign debtor. What the court actually does by requiring the debtor to pay is to make his assets available for attachment and discharge of his debt.²⁴ To disallow the claim of the creditor, particularly a domestic creditor, for satisfaction of his debt out of his debtor's assets in the forum would amount to subjecting the territory of the forum to a prohibition issued in the sole interest of a foreign state. No injury will be inflicted upon the debtor by such enforcement of his debt since the authorities in his own country can hardly take him to task for the actions of a foreign jurisdiction.²⁵ Even should they seek to do so the forum cannot yield to such pressure. In fact no such effort has ever been made. On the contrary, foreign disregard of domestic exchange control has frequently moved the exchange authorities to allow full payment to foreign creditors.²⁶ The use of the public-policy rule

²¹ Judgment of Feb. 13, 1936, *Bull. I.I.J.* 34, 284.

²² Thus by Dietrich, *J.W.* 1936, 3013 and 3503, and by R. Neumann, *op. cit. supra*, p. 487, n. 1, at 72. Mr. Dietrich's theory was elaborately refuted by the Swiss Federal Tribunal, Feb. 1, 1938, *Amtliche Sammlung* 64 II 88, at 100, quoting the present writer.

²³ *Infra*, p. 500.

²⁴ For analogous reasons, the Swiss Federal Tribunal, Oct. 26, 1937, *Amtliche Sammlung* 63 II 383, allowed a Swiss defendant to set off against the plaintiff's claim a debt which was governed by foreign law and could not be set off under that law for reasons of exchange control.

²⁵ This point is made in Swiss Federal Tribunal, Oct. 8, 1935, *Amtliche Sammlung* 61 II 242, *sub. 4*; Court of Amsterdam, March 22, 1935, *Nederland'sche Jurisprudentie*, 1935, 590, and June 23, 1936, *Revue Critique de Droit Int.* 1937, 474.

²⁶ Thus the *North German Lloyd*, the *Hamburg-America-Paketfahrt*, and the *Siemens-Schuckertwerke*, in consequence of the American judgments, cited *supra*, n. 14, were allowed by the German ex-

or of similar conceptions may therefore result and has often resulted in the satisfaction of the creditor, and that is the proper end for the forum to pursue.

A clash of jurisdictions is unavoidable when a state adopts one-sided measures which impair the rights of subjects of other states. The contest takes place in the courts, one side applying exchange control to foreign creditors and the other side refusing recognition of the exchange control legislation. Persons who because of their residence or otherwise, are subject to the sovereignty of the legislating state may be made the victims of this conflict, but in an international combat, be it even a judicial one, subjects have to bear responsibility for the acts of their respective governments. It is with this motivation that courts have sometimes advanced the view that it is for the debtor rather than for the creditor to bear the "risk" of exchange control instituted by the debtor's country.²⁷

A solution of the conflict, satisfactory to all concerned can only be sought by international agreements as have been reached in many cases.²⁸ It is not for the courts unilaterally to bind their own government in the name of an alleged conflict-of-laws doctrine.

(c) To the extent that foreign exchange control is not recognized by the courts, there is no objection to holding the involuntarily defaulting foreign debtor liable to damages.²⁹ This is particularly true under common law which does not make negligence or intention a condition of breach of con-

change authorities to transfer to America funds for the service of their American loans. See *Moody's Industrials* 1937, 2707 (*N. G. Lloyd*); *ibid.* 1935, 2652 (*Hamb. Am. Paketfahrt*); *ibid.* 1938, p. 1933 and 1934 (*Siemens und Halske; Siemens Schuckert*). A more recent instance is the *Deutsch-Atlantische Telegraphen Gesellschaft*, *N. Y. Times*, *Fin. Sect.*, of April 23, 1938.

²⁷ Court of Amsterdam, June 23, 1936, *Revue Critique de Droit International*, 1937, 474; Court of Zurich, April 23, 1937, *Nouvelle Revue de Droit Int. Privé*, 1937, 627. (The latter case is concerned with the exchange control instituted by Italy against the Netherlands and other Powers in response to the sanctions set up by the Members of the League of Nations on the occasion of the Abyssinian war.)

²⁸ See *infra*, sec. 39 II.

²⁹ A German grain importer, not having obtained a permit to pay abroad for the goods imported, was held liable for damages by an English Arbitration Board. The German exchange control authorities, upon application by the plaintiff, allowed the sum awarded to be paid in his favor on a transferable account. Thereupon the Appellate Court of Celle, April 24, 1937, *J.W.* 1937, 2834, granted enforcement of the English award up to the amount permitted by the German authorities.

tract.³⁰ Yet the imposition of damages, penalties, *etc.*, is usually a matter of interpretation on the basis of which it may properly be decided to spare the involuntarily defaulting debtor.³¹

(d) Recognition of foreign exchange control over securities and other property situated within the jurisdiction of the forum is, of course, out of the question. Even where the owner is a national of the state that wields the control, orders emanating from the control authorities and addressed to the owner will not be enforced or otherwise considered by the forum. The latter is bound to decide all questions regarding the use of ownership independently of those orders.³² Leaving aside the general reasons in favor of the public policy rule, the contrary point of view would encroach upon the exclusive jurisdiction of the forum. In fact, acts by foreign governments should be interpreted as conforming to those basic principles of international law.

(e) Foreign exchange control may furthermore give rise to questions regarding the exercise in the forum, of special privileges by those subject to that control. For instance, may the benefit of emergency provisions for the relief of distressed debtors be extended to debtors who are prevented from payment through exchange control regulations of their home country, and are therefore in danger of foreclosures and other losses? The question has been answered in the negative, through disregard of foreign exchange control, by a German Appellate Court in the case of a foreign mortgagor of German real estate who sought protection against foreclosure under German emergency legislation.³³ And if a nonresident lacks funds for a lawsuit because his exchange authorities

³⁰ Accord: Swiss Federal Tribunal, Feb. 1, 1938, *Amtliche Sammlung* 64 II 88 at 106, construing the phrase "Should the Debtor Company make default in the payment . . ."

³¹ Accord: Swiss Federal Tribunal in the case cited. Similarly, the Italian Court of Cassation, July 30, 1937, *Foro Italiano*, 1937 I 1203, although allowing compulsory execution against the foreign debtor (*infra*, n. 33), by a broad ruling eliminated damages. As to the creditor's right to rescind an executory contract if exchange control legislation intervenes, see *supra*, p. 484, n. 58.

³² Court of Rotterdam, March 30, 1937, *Nederland'sche Jurisprudentie*, 1938, 686.

³³ Appellate Court of Berlin (*Kammergericht*), Oct. 27, 1932, *J.W.* 1932, 3773. Italian Court of Cassation, July 30, 1937, *Foro Italiano*, 1937 I 1203 allows foreclosure of Italian real estate of a German resident prevented from transferring funds to Italy. No emergency relief legislation of the forum was involved in this case.

will not allow the transfer, he will probably not be permitted to sue *in forma pauperis*.³⁴ He may, however, be protected by international treaties. Under a Treaty signed at the Hague in 1896, Germany and Switzerland, among other states, have exempted each other's nationals from the rule under which a foreign plaintiff must give security for costs. By another provision of the same treaty judicial decrees holding the plaintiff liable for costs were made enforceable within the territories of all the signatory states. Thus the defendant was apparently protected. However, after Germany had set up her foreign exchange control, enforcement of the decree and transfer of the proceeds of the execution became dependent on the consent of the German exchange authorities. A Swiss court, therefore, despite the treaty, demanded security from a German plaintiff, but was reversed by the Swiss Federal Tribunal which held that the Hague Treaty was not abrogated by the institution of German exchange control;³⁵ the corollary being, of course, that the German authorities are bound by the Treaty to issue the permits necessary to satisfy the Swiss defendant's judgment for costs.³⁶

(f) Non-recognition of foreign exchange control legislation may sometimes affect third persons. A Swiss firm had assigned to another Swiss firm a debt against a German firm, without the permit required by the applicable German law. The Swiss Federal Tribunal held the assignment good because German exchange control was not binding upon Swiss courts although the debt was governed by German law; and the court held immaterial even the fact, indicative of a questionable transaction, that the plaintiff had bought the debt at 30-40 per cent below the face value.³⁷ This theory was followed in a case where a German creditor in Germany had assigned his debt against a Swiss debtor to a Swiss assignee.³⁸

³⁴ Polish Supreme Court, May 7, 1936, 3 *Zeitschrift für Osteuropäisches Recht* (New Series) 332; Appellate Court of Darmstadt, Jan. 9, 1935, *J.W.* 1935, 2385.

³⁵ Swiss Federal Tribunal, Nov. 25, 1932, *Amtliche Sammlung* 58 I 307.

³⁶ Such a duty, however, does not seem to be recognized by the semi-official commentary of Flad-Berghold-Fabricius, cited, *supra*, p. 477, n. 4, at A 77.

³⁷ Swiss Federal Tribunal, Oct. 8, 1935, *Amtliche Sammlung* 61 II 242.

³⁸ Swiss Federal Tribunal, Feb. 19, 1936, *Amtliche Sammlung* 62 II 108.

II. *Recognition of Foreign Exchange Control in Special Situations (Absence of Contrary Interest, Smuggling, etc.)*

(a) The concept of public policy is "relative" in the sense that its use depends on the extent to which the effects of foreign legislation are actually harmful to the interests of the forum.³⁹ There must be a material contact of the case with the forum to warrant the use of the public-policy weapon. A situation which has been repeatedly dealt with by German courts is illustrative. After the outbreak of the Bolshevik revolution, many Russians, disregarding the stringent Russian exchange control, delivered money to other Russians to have it taken abroad. The recipient usually gave the payor either a written promise to pay a certain amount of dollars in New York or a bill of exchange drawn on a New York bank. On suit brought by the promisee in a German court there was no reason of German public policy requiring the court to refuse to enforce the Russian exchange law in such entirely Russian cases. No German interest was at stake. It is true that the promisor had settled in Berlin, but this "contact" of the litigation with the forum was too superficial. Nevertheless, the *Reichsgericht* held the contract good, obviously because of aversion to Bolshevik legislation.⁴⁰ This ruling, however, was later practically abandoned by German courts.⁴¹ Expulsion and flight of "Non-Aryans" and of politi-

³⁹ See Nussbaum in Cheatham-Dowling-Goodrich, *Cases and Materials on Conflict of Laws* (1936) 502 at 505, and at greater length, in *Internationales Privatrecht* (1932) 63, 68.

⁴⁰ Judgments of Oct. 3, 1923, *R.G.Z.* 108, 241; March 12, 1928, *J.W.* 1928, 1196; similarly *Kammergericht*, April 1, 1926, *J.W.* 1926, 2002. The *Reichsgericht* asserted that the prohibition ordained by the Russian government rests on principles of economic and social policy which are "state-socialist" (*staatssozialistisch*) and incompatible with German policy. However Germany herself had at that time enacted similar provisions. Act of Feb. 3, 1922, *R.G.Bl.* 1922, 195. Furthermore, the court read into the contract an implied agreement that the place in which the promisor first settled after his flight from Russia, should be the place of payment. This place being Berlin the court in addition to the public policy argument, applied German law to the contract. This theory of the court furnishes an instructive list of judicial errors. (1) The implication by the court was arbitrary. (2) Parties cannot escape a prohibitive and punitive law by declaring that their contract should be subject to a foreign legal system. (3) One cannot have a "homeless" contract, the law of the contract to be determined at some indefinite future time.

⁴¹ Appellate Court of Hamburg, May 16, 1929, *Hanseatische Rechts-*

cal dissenters from Germany and other countries may now engender related problems.⁴²

Another situation has lately become frequent. Speculators buy bonds in a market depressed by foreign exchange control, and then bring suit for full payment in a more favorable forum. (Divergence of judicial attitude towards gold clauses may occasion similar tactics.) What should the decision in such cases be? Must the bondholder be defeated because in such cases there is not sufficient contact with the forum to warrant the use of the public policy concept? The Swiss Federal Tribunal gave this problem careful examination in the case of a German bearer bond loan of which a fifth had been placed in Switzerland.⁴³ Although there was no Swiss place of payment or of collection, the court deemed the contact sufficient to justify resort to public policy. The court declined to discriminate among the bondholders according to the time of acquisition of the bonds, since such discrimination would result in breaking up the bearer clause of the bonds; a reasoning in harmony with the dominant doctrine in respect to multiple-currency bonds⁴⁴ which the bonds here considered frequently are. The court reserved the right to refrain from the use of the public policy concept in cases where contact of the loan with Switzerland was lacking. At all events, protection of the forum's security market may be a sufficient motive for rejecting the application of foreign exchange control laws.

(b) Despite the presence of contacts with the forum, there may be special circumstances possibly warranting judi-

und Gerichtszeitschrift, 1930 B 743, and, through a different interpretation of virtually identical facts, *Reichsgericht*, Dec. 13, 1929, *Warneyers Rechtsprechung*, 1930, 78.

⁴² According to the law of Dec. 12, 1933, *R.G.Bl.* 1933 I 1733, sec. 55, which was preceded by a similar decree of Dec. 1, 1935, *R.G.Bl.* 1935 I 1408, a German emigrant remains subject to restrictions, prohibitions and duties in respect to things regarding which he had been subject to such restrictions, prohibitions and duties before his emigration. A German emigrant creditor of a German emigrant debtor is therefore merely entitled to a payment into a German blocked account, subject to the consent of the German authorities. Damages for nonperformance would probably be slight or nominal under these conditions. American public policy would not come into play. See *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277 N.Y. 474, 14 N.E. (2d) 798 (1938). For a discussion of other debt situations resulting from German emigration, see Neumann, *op. cit. supra*, p. 487, n. 1, at 100.

⁴³ Judgment of February 1, 1938, *Ämtliche Sammlung* 64 II 88 at 104.

⁴⁴ *Supra*, p. 451.

cial recognition of foreign exchange control. Contracts are sometimes directly violative of foreign exchange control; as by providing for a payment within (or a transfer from) a country, forbidden by its exchange control laws. There seems to have been no consideration of the question involved by Anglo-American courts. The tradition according to which contracts in violation of foreign customs laws and the like are nevertheless sustained, is disappearing⁴⁵ because normal measures of financial and economic administration should be mutually respected by civilized nations. Exchange control, however, is different because it impairs existing contractual relations and is discriminatory. Generally speaking, the proper attitude to take toward agreements to violate or circumvent foreign exchange control would appear to "leave the parties to themselves".⁴⁶

The course of civil law courts in kindred situations is vacillating. A French firm, debtor of a German firm, bought from a French bank "inland marks" to be paid to the creditor in discharge of the debt. The bank forwarded the amount owed the creditor through an agent operating in Germany under a fictitious name, thus violating German exchange control. The manoeuvre was discovered and the money confiscated by the German authorities. The Appellate Court of Paris⁴⁷ dismissed the bank's claim for the purchase price so that the bank was made to bear the entire loss. The court stressed the fact that the intended discharge of the debt of the French firm was not accomplished, rather than that German law was violated.⁴⁸ A certain deference to the German

⁴⁵ See Beale, *A Treatise on the Conflict of Laws* (1935) 610.1 and 610.2. Generally, a bargain the performance of which involves a violation of the law of a friendly nation is illegal. Restatement, *Contracts* (1932), sec. 592.

⁴⁶ Language used in *Thomas v. City of Richmond*, 12 Wall. (79 U.S.) 349 at 358 (1871).

⁴⁷ Judgment of March 26, 1936, *J.D.Int.* 1936, 931. The rule was followed in the judgment of the same court, Dec. 8, 1936, *Sirey, Chronique Hebdomadaire*, 1937, 6.

⁴⁸ See the annotation by Tager to the judgment of March 26, 1936, *J.D.Int.* 1936, 935. Prof. Niboyet, *Revue Critique de Droit International*, 1936, 490, goes too far in interpreting the judgment as an example of international collaboration in the field of exchange control. A clear theory underlies Appellate Court of Colmar, March 11, 1938, *Revue Juridique d'Alsace et de Lorraine*, 1938, 511, denying discharging effect to a payment made in Germany by a debtor (apparently French) to a German creditor, through remittances forbidden by German exchange control. The court laid all its emphasis on the fact that the relevant events had occurred in Germany.

regulations is evident in the court's express refusal "to give any recognition to fraudulent transactions". It was probably material that the performance was actually to be made within Germany. The Austrian Supreme Court⁴⁹ decided the same way in a case where money had been smuggled into Czechoslovakia and embezzled before delivery to the addressee. Non-performance would have been a sufficient and perhaps more appropriate ground to assign than in the French case. The court, however, expressly nullified the transaction as a device to evade foreign law "to the detriment of the community", and "for profit reasons", a view not reconcilable with the fact that transactions in violation of Austrian exchange control were not held invalid at the time by the Austrian courts.⁵⁰ Swiss courts, on the other hand, have protected the banker, which in practice means the Swiss party, on the theory that the purchase of "inland" marks was not unlawful because the German authorities might have consented to the transaction (an assumption obviously too optimistic under the circumstances). The courts therefore imposed the loss resulting from the adverse course of events on the customer as the "principal" of the bank.⁵¹ Even where the contract is unambiguously aimed at violating exchange control within the prohibiting country, the court may sustain the contract in some circumstances. A German emigrant, contrary to German law, had commissioned a Frenchman to procure for him from Germany belongings left there by him. The Frenchman's activities were discovered by the German authorities and he was made to pay a high fine and other costs. The Appellate Court of Colmar held the emigrant liable to compensate the Frenchman, his agent; the court attributed a "purely political character" to the German prohibition, the violation of which was neither illicit nor immoral in the opin-

⁴⁹ Judgment of Feb. 9, 1937, *Die Rechtsprechung*, 1937, 82.

⁵⁰ *Supra*, p. 483, n. 48.

⁵¹ Commercial Court of Zurich, March 9, 1934, *Blätter für Zürcherische Rechtsprechung*, 1935, 135, *aff'd* by Swiss Federal Tribunal, July 10, 1934, *ibid.* 140; and of May 8, 1935, *ibid.* 140; Appellate Court of Basle, March 1, 1935, quoted in *Die Rechtsprechung*, 1937, 85 ann.

Recently, the Swiss Federal Tribunal, September 28, 1938, 5 *Nouvelle Revue de Droit Int. Privé* 414 (ann. by Mezger) has, on principle, refused to hold illicit and void transactions violating foreign exchange control laws. In this case a Czechoslovakian firm had agreed with a Swiss firm to make, for the latter, a payment of "inland shillings" in Austria, in violation of Austrian exchange control.

ion of the court.⁵² The agency contract was therefore deemed valid. The language of the court was probably influenced by the fact that the person whose funds were withheld in Germany had been compelled for political reasons to leave that country.

(c) Another limitation on the policy of disregarding foreign exchange control was exhibited in the English case *De Beêche v. The South American and Chilean Stores*.⁵³ The plaintiff, a Chilean citizen living in Paris, had leased property situated in Santiago de Chile to the defendant English companies, the rent to be paid in pounds sterling under a provision that "payment shall be effected . . . in Santiago de Chile on the first day of each month by first class bills on London". After the making of the contract, Chilean exchange control legislation was enacted which made the giving and taking of foreign bills dependent upon the consent of the Bank of Chile, a consent denied in this case. Thereupon the lessees refused to comply with the demands of the lessor for the agreed bills of exchange. The lessor brought suit in England claiming, apparently, as damages, £53,359, the agreed amount of the arrears. The claim was dismissed because it had become impossible for the defendants to perform their contracts without violating the Chilean law and rendering themselves subject to penalty. It has an important bearing on the case that this was not a simple action of debt. The plaintiff had insisted upon the defendant's handing over in Santiago bills drawn on London, action punishable by law; the claim was based upon non-compliance with this demand. Such a cause of action the court was unable to uphold. In a connected case the Court of Appeal pointed out that under the contract at bar payment was not to be made "from anywhere in the world", but exclusively by "an option of remission to Europe from Chile".⁵⁴ Regardless of whether this interpretation is correct, it constitutes one of the operative elements of the judgment and justifies it because remittance

⁵² Judgment of Feb. 16, 1937, *J.D.Int.* 1937, 784. The same court had previously declared valid a promissory note signed in France by a Frenchman with intent to violate German exchange regulations. Judgment of June 24, 1932, *Sirey* 1934 II 73 (with annotation by Prof. Niboyet).

⁵³ [1935] A.C. 148 (H. of L., 1934).

⁵⁴ *St. Pierre v. South American Stores* [1937] 3 All E.R. 349 at 356 (C.A., 1937).

could not be made without violating Chilean penal law. In a simple action of debt, on an obligation payable abroad, however, brought by the creditor in an English Court against a debtor residing abroad, where the debtor relies on the exchange control of his country, the cases discussed above would not stand in the way of allowing the creditor to satisfy his claim out of the debtor's English assets.⁵⁵ This would be particularly true should the creditor be an English resident.

(d) The underprivileged status of "inland money", transported abroad, must necessarily be recognized. It cannot be used abroad as legal tender.⁵⁶

⁵⁵ In *Mayer v. Hungarian Commercial Bank of Pest*, 21 F. Supp. 144 (D.C. E.D. N.Y., 1937), the defendant, trustee of a Hungarian municipal loan floated in the United States, under Hungarian exchange control had not taken the steps required by the trust deed to secure payment of the loan. The complaining bondholder who was seeking damages for breach of contract lost the suit partly on the ground that the defendant bank was unable to fulfill its obligations under the punitive Hungarian exchange control. Here again the situation was different from the case of an ordinary debt. The same is true of *Reichsgericht*, June 28, 1918, *R.G.Z.* 93, 182, where a German importer was denied damages when his English seller had refused delivery of the goods under the English *Trading with the Enemy Act*, 1917. (A judgment notworthy because the court, during the war, decided a doubtful case in favor of the enemy party taking into account a hostile law of the inimical country.)

Ralli Brothers v. Compania Naviera Sota y Aznar, [1920] 2 K.B. 287 (C.A., 1920), is likewise reconcilable with the theory stated above. In that case the Court dismissed the complaint of a Spanish shipowner who had sued his English charterer for the full freight payable in Barcelona, notwithstanding the fact that the freight exceeded the legal maximum prescribed, under penalty to both parties, by a Spanish law enacted subsequent to the time of contracting. This use of the place-of-payment theory is highly disputable, see *supra*, p. 228, but the case is distinguishable first because the Spanish measure was not discriminatory, and second because the plaintiff, though subject to Spanish jurisdiction, by this very suit committed, or prepared, a punishable violation of Spanish law. From the viewpoint of English public policy, there was certainly no reason to protect the plaintiff in this situation.

⁵⁶ When an American, owing reichsmarks for purchases made in Germany was sued in the American Consular Court in Shanghai and tendered notes of the *Reichsbank* which are legal tender in Germany the tender was held bad by the Court. Judgment of Oct. 5, 1936 (translation), *J.W.* 1937, 711. [While this book was in press, the Privy Council in *Pymont, Ltd. v. Schott*, [1938] 4 All. E.R. 713, rendered a similar and remarkable decision regarding Spanish (inland) pesetas.]

The divesting of reichsmark notes of their ability to serve as media of payment abroad has been sanctioned by international treaties concluded by Germany with other Powers, e.g., by the French-German Treaty on Commercial Payments of 1937, art. 1(2), *R.G.Bl.* 1937 II 508. Cf. also Commercial Tribunal of Liège, Feb. 23, 1937, *Jurisprudence de la Cour d'Appel de Liège*, 1937, 224, applying to the same effect the German-Belgian Treaty of July 27, 1935. The course of the Italian government is similar. See the Franco-Italian Treaty of April 30, 1938, *Journal Officiel*, 1938, 4973, art. 1(1), forbidding the use in France of Italian notes and subsidiary coins.

On "inland money" in general, see *supra*, p. 129.

(e) Investments of trust and similar funds in securities of, or in other property connected with, a country under exchange control will ordinarily not be permissible.⁵⁷ A Pennsylvania Court has also refused to allow remittances into Germany out of estate funds, because of lack of reciprocity on the part of Germany.⁵⁸

III. Sureties Under Foreign Exchange Control

In international financing, creditors frequently protect themselves against the debtor's failure by procuring sureties or guarantors outside the debtor's country. A special problem of foreign exchange control arises from that practice.⁵⁹ When the debtor's country under the pressure of emergency forbids the transfer of funds, the sureties, of course, seek to avail themselves of the transfer prohibition as a defense. In 1925 a Swiss bank had guaranteed the debt of a German firm to a Swiss company. In a suit on the guaranty, the Swiss Federal Tribunal decided against the bank which had pleaded the German exchange control legislation.⁶⁰ The court observed that a Swiss creditor holding a Swiss guarantee of a German debt, obviously means by obtaining such guarantee to protect himself not only against the debtor's insolvency but also against any other risks to which the debt may

⁵⁷ *Chase National Bank v. Reinicke*, N.Y.L.J. of Dec. 30, 1938, at p. 2371.

⁵⁸ In re *Estate Mabel Somers Sharp (Hartman)*: New York Times, Dec. 13, 1938, p. 19 (Common Pleas Court, Philadelphia). A few days later, the German Government submitted to the American Government a note to the effect that in future Germany will allow such remittances into the United States. New York Times, Dec. 21, 1938, p. 18.

Under an Oregon Act of March 11, 1937, Oregon Laws, 1937, c. 399, aliens residing outside the United States may take personal property by inheritance only where citizens of the United States in the reverse situation would be entitled to receive the inherited personal property within the United States. The question whether such enactments are in conformity with American trade treaties has not yet been before the courts. No doubt the basis of the treaty provisions has been shaken through the institution of exchange control insofar as property transfers from one country to the other are concerned.

⁵⁹ See the informative article of Domke, "*Les garanties de tiers dans les emprunts internationaux*", *Revue de Science et de Législation Financières*, 1936, 598.

⁶⁰ Judgment of Sept. 18, 1934, *Amliche Sammlung* 60 II 294. The court was troubled by the question whether the German law was substantive or procedural but rejected it anyhow for reasons of public policy. The court, however, adopted a different rule in the case of clearing agreements and at the same time intimated that its former ruling was questionable. *Infra*, p. 512, n. 36.

be subject in Germany. Those risks included, in the opinion of the court, the possibility that Germany's political and economic condition might make necessary legislation adverse to the rights of foreign creditors. The argument is convincing and is applicable in the great majority of surety cases, regardless of the creditor's residence in the forum. This involves a certain independence of the surety-obligation vis-à-vis the principal debt, a phenomenon well known in conflict-of-laws.⁶¹

The Austrian Supreme Court, in the case of an Austrian creditor, has held in the same way as the Swiss Tribunal,⁶² but has held for an Austrian surety against a non-Austrian creditor.⁶³ In the first case involving Hungarian exchange control, the court remarked that foreign exchange control is aimed at protecting the budget of the foreign state, and does not affect the privity between creditor and debtor.⁶⁴ The court, citing the Austrian Civil Code and quoting a leading German legal writer, declared in general terms that foreign legislation affords no defenses to the surety. In the second case, involving a German creditor and German exchange control, the court read into the German law governing the surety contract, the opposite rule although it was not supported by any German case and was at variance with the views of the German writer cited in the previous judgment.⁶⁵

Related problems have appeared in international credit insurance. A policy sold by a French company purported to protect the insured, a French firm, against definitive losses they would suffer from insolvent customers. A Hungarian

⁶¹ The proper law governing the suretyship may differ from the proper law governing the main debt. Rowlatt, *Principal and Surety* (3d ed., 1936) 64; Nussbaum, *Deutsches Internationales Privatrecht* (1932) 268, with references. For instance, sureties have been denied the benefit of a moratorium granted to the foreign debtor in the country of his domicile, Appellate Court of Hamburg, Feb. 24, 1915, *Hanseatische Gerichtszeitung*, 1915, 101; July 7, 1915, *ibid.* 1915, 238. Under American law sureties in war time were held liable to pay interest although interest did not run against the debtor, who was an alien enemy. *Paul v. Christie*, 4 Harr. & McH. (Md.) 161 (1798); *Bean v. Chapman*, 62 Ala. 58 (1878).

⁶² Judgment of Sept. 5, 1934, *Die Rechtsprechung*, 1934, 178.

⁶³ Judgment of April 24, 1936, *Die Rechtsprechung*, 1936, 146.

⁶⁴ This argument enunciating the substantive-law theory has disappeared in the 1936 case. The other argument (*supra*, n. 61) would have carried the disposition of the 1934 case.

⁶⁵ There was no direct discussion of the present problem in German legal writings; and upon analogous problems dealt with in the commentary cited the writers had split.

customer, although not insolvent, was prevented by the intervention of the Hungarian Exchange control from full payment. The Appellate Court of Paris held the insurance company liable to indemnify the insured firm; a very questionable adjudication, the risk of exchange control being different from insolvency risk.⁶⁶

IV. Taxation of Blocked Accounts

Sums blocked abroad under exchange control are not to be assessed, for purposes of taxation, at the rate of exchange prescribed by the authorities of the blocking country; nor, of course, are market quotations for "free" (non-blocked) currency of the same denomination applicable.⁶⁷ To the extent that the blocked sums are actually saleable, the market price will be resorted to in taxation.⁶⁸ English cases have held that an amount paid into a blocked account is not taxable income nor are the proceeds of a sale thereof or of bonds (scrips) delivered by the defaulting debtor in lieu of interest.⁶⁹ These decisions rest, however, upon very technical provisions and concepts of English tax law.

⁶⁶ Appellate Court of Paris, Nov. 8, 1935, *Recueil de la Gazette Tribunaux* 1935 II 472.

⁶⁷ Letter of February 26, 1935, signed by the U. S. Commissioner of Internal Revenue, reproduced in Prentice-Hall *Federal Tax Service*, par. 6027-A, Commerce Clearing House, *Federal Tax Service*, par. 386.1645.

⁶⁸ *International Mortgage and Investment Co. v. Commissioner of Internal Revenue*, 36 B.T.A. 187 (1937). If the taxpayer cannot dispose at all of the blocked account no income has accrued—same case. This seems to be also the French administrative practice. Maguéro, Molas and Chappaz, *Traité Alphabétique de l'Enregistrement ect.* (1937) 769 no. 125 (bis). Similar (though possibly somewhat stricter) *Reichsfinanzhof*, May 29, 1935, 38 *Sammlung der Gutachten und Entscheidungen* 69. On the other hand income of non-residents which has to be paid into blocked accounts is assessed in Germany at its full nominal value. *Reichsfinanzhof*, May 20, 1937, 41 *ibid.* 245; May 12, 1937, 41 *ibid.* 266. See also *Reichsfinanzhof*, April 28, 1938, *Reichssteuerblatt*, 1938, 602, concerning property taxes. To alleviate the hardship caused by these decisions, recent Treasury Regulations (July 5, 1937, *Reichssteuerblatt*, 1937, 829; June 1, 1938 *ibid.* 1938, 569), permit the valuation of certain types of blocked income at a percentage about midway between the nominal amount of the income and the actual market value of the blocked account. For details see Troeger, "*Steuerrecht und Devisenbewirtschaftung*" in *Devisenarchiv*, 1938, 569 and 607.

The American theory seems to expect the taxpayer to make separate dollar computations for each petty item on the assets and liabilities side of his blocked account, at the respective rates to be ascertained for the various days in question; in a changing market a highly undesirable, if not unworkable requirement.

⁶⁹ *Inland Revenue Commissioner v. Paget*, [1938] 2 K.B. 25 (C.A., 1938); *Cross v. London and Provincial Trust, Ltd.*, [1938] 1 All E.R. 428 (C.A., 1938).

SECTION 39

INTERNATIONAL CONTROVERSIES AND AGREEMENTS
ON EXCHANGE CONTROLI. In General¹

It has been shown how courts frown upon foreign exchange control. From an economic point of view, however, judicial opposition is not very potent. But the methods of redress available to governments are more effective. The government of a preponderantly importing country will ordinarily possess an advantage in its debit balance. It may "impound" the balance due to the country under exchange control, and use the payments due to sellers in the latter from its own importers to satisfy its citizens (or residents) who have debtors in that state. To accomplish this importers, and other debtors too, may be required to make payment into a special account in the country's central bank to be employed to satisfy domestic creditors. Switzerland used this "compulsory clearing" method against Spain and Poland.²

¹ Swiss literature on this matter is outstanding. The most thorough and comprehensive discussion is Hug, "*Das Clearingrecht und seine Einwirkung auf die vertraglichen Schuldverhältnisse*" in *Zeitschrift für Schweizerisches Recht* 1936, 397a. See furthermore Viell, "*Das Rechtssystem der Clearingverträge*" and Jaccard, "*De l'Incidence Juridique du Clearing*" (*Schweizerische Vereinigung für Internationales Recht*, publication no. 32, 1934); Rosset, "*Les accords de clearing et les obligations contractuelles*", *Zeitschrift für Schweizerisches Recht*, 1936, 201a; Mettler, *Die Clearingzahlung* (1936). Much less satisfactory are Jolly, *Traité des Opérations de Compensations* (1935), a confused description of the clearing treaties concluded by France, and Fischer, "*Devisenclearing*" (*Schriftenreihe zum Devisenarchiv, Heft 5*, probably 1937), discussing, without legal analysis, the German development and listing the German treaties. As to Hungarian law see de Szász, *J.D.Int.* 1937, 738. The Dutch clearing treaties are dealt with by Seller, *Economische Gevolgen der Nederland'sche Clearingverdragen* (Amsterdam, 1937), a study of more than local interest. General surveys are League of Nations, *Enquiry into Clearing Agreements*, C. 153 M. 83 (1935) and International Chamber of Commerce, *Accords de Compensation* (trilingual, 1936). Other discussions in the English language are Harris, *Germany's Foreign Indebtedness* (1935) 60; Ohlin, "Mechanism and objectives of exchange control", (1937) 27 *Am. Econ. Rev.*, Supp. 1, p. 141.

A new and comprehensive publication, *Clearing and Payments Agreements*, was announced by the Int. Chamber of Commerce while this book was being printed.

² See Hug, "*Das Clearingrecht und seine Einwirkung auf die vertraglichen Schuldverhältnisse*" in *Zeitschrift für Schweizerisches Recht*, 1936, 397a at 401a.

More often the mere threat of compulsory clearing has been used to force concessions from the defaulting state. Thus after Germany had discontinued the payment of interest to foreign bondholders and English-German negotiations on the subject had failed, the English Parliament passed a *Debts Clearing Offices and Import Restrictions Act*³ which, however, did not become effective because Germany agreed to modify her exchange control in favor of English creditors.⁴ Similar developments have occurred in other cases.⁵

The United States, because of its active balance of trade with Germany, has been unable to resort to compulsory clearing. The Department of State in 1934 repeatedly and "vigorously" protested the measures taken by the German government, but with little success.⁶ However, in 1936, a somewhat retaliatory step was taken by the American government when it found that the German authorities employed the blocked mark in various ways to promote Germany's foreign trade. For instance the *Golddiscont-Bank*, subsidiary of the *Reichsbank*, would sell blocked mark credits to German exporters at a discount. Those credits, becoming free in the hands of the exporters would decrease their production cost.⁷ Because of these activities the American Government ordered "countervailing" duties upon goods so favored to be levied under

³ 24 & 25 Geo. V, c. 31 (1934). The act gives a concise picture of a clearing set-up. Its historical background is discussed by Harris, *op. cit.* 60.

⁴ *Infra*, n. 19.

⁵ See Harris, *op. cit.* 64.

⁶ The facts are set forth at length in (1937) 5 Securities and Exchange Commission, *Report on Protective and Reorganization Committees* 421 *et seq.* The main grievances of the American Government were the preferred treatment of non-American creditors under the special agreements made by England and other countries and the repatriation of German dollar bonds at cut prices with the very foreign exchange the lack of which was pleaded by the German Government as an excuse for its default. The German viewpoint is presented by Ritter (Director of Section in the German Foreign Office) in "Germany and Clearing Agreements", (1936) 14 *Foreign Affairs* 465.

⁷ 38 Op. Att. Gen. 489 at 497 (1936). In other cases German exporters were allowed to buy from the *Golddiscont-Bank* "scrips" of the *Konversionskasse* at a discount of somewhat less than fifty per cent and redeemed them at par with the *Konversionskasse*, the difference constituting a subsidy to the exporter. Or the exporter was permitted to use part of the foreign exchange proceeds of his sale to purchase German dollar bonds in the United States at the market price, which was very low as a result of the exchange control, and then have the bonds redeemed in Germany at par. Op. Att. Gen., *loc. cit.* at 494. The opinion uses the term "controlled marks" instead of "blocked" marks, but there is no difference in substance.

the Tariff Act of 1930 which makes this measure mandatory where foreign governments "pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export" of dutiable merchandise.⁸ The German Government seems to have asserted that its practices were merely special forms of currency depreciation no more within the meaning of the Tariff Act than a general devaluation of the reichsmark would be.⁹ The reference to devaluation served also to remind the American Government of its own earlier devaluation of the dollar which the German conduct complained of merely offset.¹⁰ Nevertheless, the schemes elaborated by the German authorities were clearly "selective and discriminating" within the meaning of the Tariff Act.¹¹ The German Government later terminated the arrangements objected to in relation to certain major exports, and the countervailing duties were revoked to the same extent.¹²

II. International Agreements; Clearing Treaties

The conflicts resulting from the institution and elaboration of exchange control ordinarily require settlement by international bilateral agreements.¹³ These agreements are sometimes private in nature. Such were the "standstill" (*Stillhalte*) agreements relating to short-term credits, of 1931 and later, which were made for the most part by groups of American and English banks with German banks,¹⁴ and in

⁸ Act of June 17, 1930 sec. 303, 46 Stat. 590 at 687, 19 U.S.C. 1303. Treasury Decision 48,360, 69 Treasury Decisions 1008 (1936).

⁹ The notes of the German Government have not been published, but it can be easily inferred from the opinion of the Attorney General, *loc. cit.* at 499, that this argument was advanced by the German Government.

¹⁰ That there was some merit in this contention, from an economic point of view, was recognized on the American side, see (1936) 143 *Commercial and Financial Chronicle* I 811 and 1133.

¹¹ See also *supra*, p. 489 at n. 9.

¹² Treasury Decision 48,463, 70 Treasury Decisions 172 (1936).

¹³ It seems generally to be recognized that the "most-favored-nation clauses" do not extend to agreements on exchange control. Seller, *op. cit. supra*, n. 1, at 21.

¹⁴ The official German denomination is *Deutsches Kreditabkommen* (German Credit Agreement), with the addition of the year. Special agreements have also been concluded with Swiss creditor banks. The agreements, which are renewed every year, are listed and summarized in Flad-Berghold-Fabricius, *Das Neue Devisenrecht* (1937) A 8, 11. The main agreements are commented upon every year in the *Bankarchiv* by H. Simon. The customers of the German banks do not participate in the benefits of the agreements, *Reichsgericht* Jan. 15, 1934, 33 *Bankarchiv* 388. In addition to the standstill agreements, there are similar

which the German government cooperated by enacting the laws necessary to make the agreements effective,¹⁵ and by granting the necessary permits.¹⁶ In the great majority of cases, however, the agreements are concluded between sovereign states.¹⁷ Such agreements are of two kinds. Some which in German are called *Zahlungsabkommen* ("Payment-agreements") purport to secure, through governmental intervention but without clearing, payment of debts owed by residents of one country to residents of the other and the transfer of those payments. The name "transfer agreements" would seem more appropriate since transfer is the real problem involved.¹⁸ Of this kind are the English-German payments agreements of 1934¹⁹ under which German debtors pay into a *Reichsbank* account held in the name of the Bank of England reichsmarks which the Bank of England may then use to pay for exports from Germany and for certain other purposes.²⁰

Much more important, however, are the "Clearing Treaties" (*Verrechnungsabkommen*). The following is the scheme of a clearing treaty concluded between State A and State B: The A debtors (principally importers) make payment in their national currency to the A central bank of debts owed to B creditors and B debtors make similar payments to the B

conventions with German public corporations. These "Credit agreements for German Public Debtors" (Municipal Agreements) are likewise listed in Flad-Berghold-Fabrizius, *op. cit.* See also Harris, *Germany's Foreign Indebtedness* (1935) 22 and 103.

¹⁵ These laws (executive decrees) are listed and summarized in Flad-Berghold-Fabrizius, *op. cit.*, C. 7.

¹⁶ It was understood in the agreements that no foreign creditor should be privileged over standstill creditors. But that understanding does not amount to a recognition, by foreign powers, of German exchange control. Jedlicka (1937) 34 *Schweizerische Juristenzeitung* 85, reports that the *Reichsbank* has taken the contrary view. The accuracy of the report seems questionable. There never was a doubt that the agreement extended legally only to contracting debtors and creditors. Flad-Berghold-Fabrizius, *op. cit.*, A 12.

¹⁷ There is also a semi-official group, formed by agreements between the central national banks which direct exchange control in the respective countries. See "*Accords de Compensation*", cited *supra*, n. 1, at 5. In substance these agreements are private in character.

¹⁸ The first Anglo-German treaty of July 4, 1934, [1934] *Command Papers* 4640, was so denominated.

¹⁹ [1934] *Treaty Series*, No. 22 ["*Exchange Agreement relating to Commercial Payments*"] and [1935] *ibid.*, No. 26, ["*Payments Agreement*."]

²⁰ Further instances are given by Flad-Berghold-Fabrizius, *op. cit.* D 70 *et seq.*; Hug, *art. cit. supra*, n. 1 at 405a; *Accords de Compensation*, *cit. supra*, n. 1, at 6.

central bank of their debts to A creditors; from the funds thus received each central bank will satisfy the creditors in its own country by paying out domestic currency equivalent to what the debtor has paid to his own central bank. (Notice of payments is given by the debtor's bank to the creditor's bank.) After discharging the claims of creditors with the funds paid by debtors, the surplus, if any, where not used for payment to underprivileged (non-commercial) creditors must be turned over to the clearing bank of the other country ordinarily in the latter's currency, to settle the balance; but frequently payment is avoided by additional exports of the debtor country, by credit transactions, *etc.* The problem of procuring foreign exchange is substantially eliminated by the clearing operation, but at heavy cost.

The first clearing treaty was that made between Switzerland and Austria in 1931,²¹ and such agreements are now in wide use. Their employment by Germany and Switzerland is particularly extensive. The common law countries thus far have not adopted them. The system of compulsory clearing which upsets the whole law of contract is certainly repugnant to the spirit of the common law. Nevertheless it is too soon to predict that in emergency the system will not be accepted by a common law country. It was by England that the compulsory clearing arrangements, incorporated in the Treaties of Versailles²² and other Peace Treaties²³ were invented and urged²⁴ and it was by England that the threat of a novel compulsory clearing was used against Germany in 1934.²⁵

The clearing device of the Peace Treaties went beyond the more recent type in its impairment of the obligation of contract. It made each government a guarantor of the debts owed by its nationals, and at the same time obligated the government to satisfy its creditor nationals. For the accomplishment of this task each government was required to set up a Clearing Office. Mutual accounts were conducted between these offices which credited and debited each other to

²¹ See Hug, *op. cit.*, at 402a.

²² Art. 296(d).

²³ *Supra*, p. 296, n. 63.

²⁴ United States Senate, 66th Cong., 1st Sess., Doc. No. 106, p. 14. Nussbaum, *Das Ausgleichsverfahren des Versailler Vertrages* (1923) 2. [French translation: *La Procédure de Compensation* (1923) 2.]

²⁵ *Supra*, p. 506.

the extent that the debts were determined through recognition by the debtor or through judicial proceeding by "Mixed Arbitral Tribunals", established by the Peace Treaties. Payments between private parties on pre-war obligations and even private negotiations thereon were forbidden under penalty.

In recent exchange clearing the contractual relationship between debtors and creditors is preserved. On the other hand, this clearing differs greatly from the familiar commercial clearing customarily used for checks. Under the clearing treaties there is no privity between the private parties and the exchange clearing institutions. The latter derive their authority and power from the law, which compels the private persons involved to act through them. The recent exchange clearing arrangements are therefore a compromise between the system of the peace treaties and the commercial clearing.

Ordinarily only commercial debts (resulting from export and import transactions) are covered by the clearing arrangement; where financial debts are included²⁶ they are more or less underprivileged. That the creditor and the debtor be domiciled in the respective territories of the signatory states, is another regular condition of the clearing obligation. If the debt qualifies for clearing under the treaty, its holder is greatly limited in the exercise of his rights. Although he still has sole power to bring a suit against the debtor in the ordinary law courts, judgment is for payment into the debtor's clearing bank.²⁷ Upon notice by the debtor's clearing bank of receipt of payment, the creditor's clearing bank will make remittance to the creditor.²⁸ The debtor's clearing bank has no action in the ordinary law courts against the debtor nor

²⁶ The International Chamber of Commerce, in its 1936 publication cited *supra*, p. 505, n. 1, at 4(B), applies to this case the confusing term "clearing and payment agreement".

²⁷ A suit for payment in specie must be dismissed under a clearing treaty. Court of Maastricht, Nov. 8, 1935, *Weekblad van het Recht*, 1935, no. 12987. Nor may a debtor under a clearing treaty, if obligated in terms of the creditors' currency, use notes of that currency for the discharge of his debt. Judge of Peace of St. Gilles, Oct. 15, 1936, *Journal des Tribunaux Belges*, 1937, 121 (Italian creditor, payment in lire tendered). See also *supra*, p. 501, n. 56.

According to the Court of Amsterdam, Oct. 19, 1937, *Bull. I.I.I.* 39, 317, the creditor is not barred by the clearing from levying upon assets of his debtor which are in the hands of the creditor or of third persons. This view would seem to be highly objectionable.

²⁸ The sequence of remittances is variously regulated by the treaties. See de Szász, *J.D.Int.* 1937, 738 at 741.

has the creditor against the bank,²⁹ their relationships appertaining, at least in the more elaborate clearing systems, to "public law"³⁰ to which jurisdiction of the ordinary law courts usually does not extend in civil law. Rights and duties of the clearing bank will be enforced through local administrative proceedings although the latter may afford only scanty protection to private parties. While the functions of the clearing offices in respect of the national creditors and debtors are sometimes analogized to the duties of a trustee in continental literature, they are at most fiduciary in character, there being no vestige of the typical common law trust relationship. One writer has more properly compared the status of the payee clearing office to that of a trustee in bankruptcy, because the payments made to the office become part of the common fund for the discharge of claims of creditors.³¹ But of course, there is no judicial supervision of the clearing, and a normal functioning of the latter means full satisfaction of the creditors.

The classification of novel phenomena under familiar legal categories is less important than the problems arising from currency fluctuations. Assume that the debtor under his contract owes currency of the creditor's country [C-currency]. The debtor must make payment to his office in his own currency [D-currency] at the rate of exchange on the date of payment. Conversion again becomes necessary when the C-office makes remittance to the creditor, who invariably receives C-currency. A long time may elapse between the two payments, intervals of a year having been reported. Since the loss from intervening exchange fluctuations is due to the interposition of the clearing machinery, the respective governments ought to be liable for injury suffered from those fluctuations by the contracting parties. Such liability has not been and certainly never will be admitted by any government, so the parties have to bear this risk themselves. There is

²⁹ Where the clearing banks are private institutions the rule may be different although the bank, being a mere paying agent of the debtor, would hardly be entitled to bring a suit against him for payment of the clearable amount.

³⁰ This is stated of Hungarian law by de Szász, *loc. cit.*, at 739, but it is of wider application.

³¹ Jaccard, *op. cit. supra*, p. 505, n. 1, at 50. The foreign creditor's right, therefore, cannot ordinarily be garnished at the clearing office by his own judgment-creditor. *Tribunal civil de la Seine*, Dec. 5, 1933, and March 19, 1935, *Bull. I.I.I.* 39, 316.

nothing to prevent the parties from regulating that risk by express agreement but such agreements seem not to be frequent.³² It would seem to be properly the function of the clearing treaty to supply this omission. Some treaties do provide that the debt is discharged through the debtor's payment to his office,³³ but the majority regard it as discharged only when the money is made available to the creditor.³⁴ Apart from treaty the latter date is generally held decisive by the courts;³⁵ nevertheless, according to sound theory the debtor having complied with the clearing agreement is not in "default" (*mora*) and is not liable for interest.³⁶ Nor do the clearing banks ordinarily pay interest.³⁷ It is not advisable under the clearing system to finance imports by bills of ex-

³² Hug, *loc. cit.*, at 583a, interprets a contractual clause under which the place of the debtor's clearing bank is the "place of payment" to mean that with the debtor's disbursement the risk of foreign-exchange fluctuations shifts to the creditor. However an agreement as to this risk should be distinct; Mr. Hug's interpretation practically may be a trap to the creditor. Under a clearing which compulsorily regulates the whole course of the financial transaction the "place of payment" clause is devoid of reality. It is the somewhat mystical place-of-payment doctrine (*supra*, p. 228), which is at the basis of Mr. Hug's conclusion.

³³ E.g., German-Dutch Clearing Treaty of 1937 art. 5, *R.G.Bl.* 1937 II 725. As to the English Act of 1934, see *supra*, p. 506, n. 3.

³⁴ Italian treaties cited in the judgment of the Appellate Court of Milan, Dec. 17, 1937, *Foro Italiano*, 1938 I 263, and Swiss treaties referred to by Mettler, *op. cit. supra*, p. 505, n. 1, at 96 and 136 (IV). The Milan court, dealing with an Italian-Austrian "payment" (not "clearing") agreement, held that the Italian debtor was liberated by receiving from the Italian Foreign-Exchange Board the Austrian shillings owed to the Austrian creditor. (He probably could avail himself of the shillings only by way of transfer.)

³⁵ As the Swiss Federal Tribunal, May 14, 1934, *Amliche Sammlung* 60 I 168, at 173, puts it, it is out of the question that payment by the Swiss debtor to the Swiss clearing bank discharges the debt. Accord: Tribunal of Milan, July 7, 1937, *Foro Italiano*, 1937 I 1034, *J.D.Int.* 1938, 135; April 20, 1938, *Banca, Borsa e Titoli di Credito* 1938, 125 [thorough discussion]; Hug, *loc. cit.*, at 519a; Jaccard, *loc. cit.*, at 49; Niboyet, quoted in Jolly, *op. cit. supra*, p. 505, n. 1, at 80. Contra: Appellate Court of Milan, judgment in preceding note.

³⁶ See Mettler, *op. cit.*, at 99. The Swiss Federal Tribunal, Sept. 21, 1937, *Amliche Sammlung* 63 II 303 at 311, held that a surety (a Swiss in this instance) was no longer liable after the principal debtor (an Italian) made payment (under the Italian-Belgian clearing treaty) at the Italian clearing office on behalf of his (Belgian) creditor. The ruling is laid down with an eye to a *solidarische Bürgschaft* which approximately corresponds to the Anglo-American surety; still it applies even with greater force to a guarantee (*einfache Bürgschaft*). As a matter of fact a surety or guarantor cannot be supposed to protect the creditor against restrictions ordained by the creditor's law. The question is doubtful, however.

³⁷ *Accords de Compensation, cit. supra*, p. 505, n. 1, at 4.

change; to do so, except under safeguards which have the disadvantage of jeopardizing negotiability, subjects the debtor to the danger of double payment.³⁸

By the more elaborate laws for the enforcement of the clearing arrangements penalties are provided for violation of the duties imposed thereunder. Those duties include giving notice and full information to the clearing bank. Payments and other acts contravening the clearing are void. Of course, attempts to evade the rigid clearing restrictions are to be expected, particularly by seeking to make payment outside the clearing channels in a third country,³⁹ or by making the transaction appear to be domestic through the interpolation of dummies.⁴⁰ Regardless of such conduct the clearing bank, provided it wields the necessary power under the national legislation, will enforce payment against the debtor. The evasive debtor is likewise in danger of having to make a double payment.

Conclusion of a clearing treaty does not imply complete recognition of the other state's exchange control. The vicissitudes of exchange control and the entire unpredictability of future developments in this field stand in the way of such recognition. A broader ground was taken by the Swiss Federal Tribunal. In disregarding German exchange control, the Court declared that "Switzerland has entered into the clearing treaty (with Germany) in a position of constraint; she had to make an effort to attenuate, through counter-measures and international agreements, the disastrous effects of German exchange control legislation".⁴¹ The case con-

³⁸ In case the drawing of a bill of exchange is "unavoidable", the Swiss Clearing Bank requires the bill to be made expressly "payable through (German-Swiss) clearing proceedings", and advises that the bill be made non-indorsable. Hug, *op. cit. supra*, p. 505, n. 1, at 590a. French practice seems to be, or to have been, more lenient. Jolly, *op. cit. supra*, p. 505, n. 1, at 48.

Contrary to what is pointed out in the text, the *Cour de Justice Civile* of Geneva, July 9, 1937, *Bull. I.I.I.* 39, 318, held that the bill-of-exchange debtor acquires a defense good also against bona-fide holders of the instrument, by paying into the clearing bank according to clearing rules. This would endanger bill-of-exchange transactions.

³⁹ See Swiss Federal Tribunal, May 14, 1934, *Amliche Sammlung* 60 I 168; July 10, 1936, *ibid.* 62 I 196, inflicting penalties upon the violators. *Infra*, n. 45.

⁴⁰ In a like case the schemers were punished by the Superior Court of Zürich, Oct. 13, 1936, *Blätter für Zürcherische Rechtsprechung*, 1938, 44, *aff'd* by Swiss Federal Tribunal, Feb. 1, 1937, *ibid.* 1938, 47.

⁴¹ Judgment of Oct. 8, 1935, *Amliche Sammlung* 61 II 242 at 248.

cerned an assignment by a Swiss creditor to a Swiss assignee of a debt owed by a German, the validity of the assignment under the applicable German law being dependent on the consent of the German exchange control authorities. The decision sustaining the assignment is justifiable under the circumstances so far as clearing is concerned since it does not matter whether A or B, both of whom are Swiss, is the creditor. The situation, however, would be different if a German creditor should assign the clearable debt to a Swiss, or a Swiss to a German, or if the assignee should be a resident of a foreign country. Under a clearing treaty, the assignment should be held good, if at all, only on condition that it does not alter the debtor's obligation to make payment to the clearing bank since otherwise the funds available for the clearing, an institution operating in the public interest, may be depleted.⁴² Attachment of a clearable debt has for good reasons been held invalid by the Swiss Federal Tribunal.⁴³ This ruling seems to point to the entire invalidity of assignments which may also be ordained by the local statute.

The result is an immobilization of clearable debts, a fact of interest, for instance, to foreigners who allow credits to holders of such debts. The rights and interests of foreigners may also be affected by the fact that the clearing sometimes covers goods produced in a state which is party to a clearing arrangement even if the importing is done from a third country. Thus a Swiss firm had bought Roumanian cow-hair from a London firm, to be paid in first-rate bank checks on London. A suit by the London firm brought in Switzerland was thrown out of court because under a Swiss-Roumanian clearing treaty importation of such hair came under the clearing. The court expressly held it irrelevant whether or not, when

⁴² In the case of the Swiss Federal Tribunal, Feb. 19, 1936, cited *supra*, p. 495, n. 38, the assignment by the German creditor to the Swiss was recognized without any mention of the German-Swiss clearing treaty. The latter was referred to by the Superior Court of Zürich, Nov. 14, 1935, *Blätter für Zürcherische Rechtspflege*, 1936, 64. The court likewise approved of an assignment from a German to a Swiss creditor and did not object to a possible payment by the Swiss debtor to the assignee. The court merely considered that the assignee would be responsible in case the money were directly transmitted to the foreign assignor. The confused decision is properly criticized by Hug, *loc. cit.*, p. 505, n. 1, at 566a. See also next footnote.

⁴³ Judgment of Dec. 13, 1935, *Ämtliche Sammlung* 61 III 204; same Court of Amsterdam, Dec. 6, 1935, *Nederlandsche Jurisprudentie*, 1936, 90, *Tribunal civil de la Seine*, May 21, 1935, *Bull. I.I.I.* 39, 316, and *Tribunal de Commerce de la Seine*, Oct. 9, 1936, *ibid.*

contracting, the parties knew of the treaty; and the fact that the creditor was domiciled in a third state, was, it seems, not even considered by the court.⁴⁴ In similar cases the Swiss Federal Tribunal decided the same way, suggesting that the seller, if domiciled in a third state, may appoint an agent within the state party to the Treaty for the collection of the purchase price.⁴⁵ This seems to impose an utterly objectionable burden upon the seller, apart from the fact that the agent, under exchange control, may be unable to transfer the money to him.

In this and other ways ⁴⁶ the clearing system is apt to affect the interests of countries not signatories to the individual agreements. It is not possible to discuss here all of its intricacies and obscurities. Those passed on by the courts, generally the more important ones, have been mentioned. They suffice to show the legal confusion and destruction caused by the clearing system to say nothing of the economic havoc for which it has been criticized.⁴⁷ In the latter respect it is enough to say that it is symptomatic of world-wide monetary decomposition.

⁴⁴ Appellate Court of Solothurn, April 22, 1937, reported by Hug, *art. cit. supra*, p. 505, n. 1, at 542a n. 303. Same: *Cour de Justice Civile* of Geneva, July 9, 1937, poorly summarized in *Bull. I.I.I.* 39, 319 [license royalty for a German film clearable although the license contract was made "by a resident of a third country"]. The Franco-Italian Clearing Treaty of 1938, *supra*, p. 501 n. 56, expressly provides that the law of the importing country is controlling as to whether merchandise ought to be considered as being of French or Italian origin.

⁴⁵ Judgment of May 14, 1934, *Amliche Sammlung*, 60 I 168. In this case the Swiss importer of an Austrian automobile was punished for not having made payment into the Swiss clearing bank in accordance with the Austrian-Swiss Clearing treaty; in fact he had imported the automobile from Germany and had already made payment in Germany, to a German agent of the Austrian seller. Yet it may perhaps be said that payment to an agent is equivalent to payment to the principal. However, an independent (Austrian) seller was the intermediary in the case of Swiss Federal Tribunal, July 10, 1936, *ibid.* 62 I 196, involving German goods clearable under the German-Swiss treaty. Again punishment was inflicted upon the Swiss importer who had made payment otherwise than through the Swiss clearing bank.

⁴⁶ If an American buys and pays for an object in Germany, then takes it into Switzerland and sells it there, he thereby becomes a violator of the German Swiss clearing treaty, since the purchase price should have been paid to him by way of clearing. He may even be liable to punishment. *Devisenarchiv*, 1938, 391. Other clearing treaties may lead to similar results.

⁴⁷ "The widespread use of clearing agreements has had serious and detrimental repercussions upon world trade." This is the conclusion of (1937) 5 *Securities and Exchange Commission* "Report of Protective and Reorganization Committees" 437, where the matter is thoroughly discussed and further references are given. See also the essay by Seiler, cited *supra*, p. 505, n. 1.

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